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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JOSEPH J. SANTOPIETRO and PERRY A. PISCIOTTI,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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10 pp

Questions Presented

1. Whether the Trial Court erred in making an upward sentencing departure for both petitioners for interfering with a government function, notwithstanding that Sentencing Guideline § 5K2.7 expressly states that this factor is "inherent in the offense," and ordinarily does not justify a departure?

2. Whether petitioners' sentence enhancements for obstructing justice contravene governing law because Santopietro's alleged obstruction did not materially hinder his investigation, prosecution or sentencing, and Pisciotti's enhancement was premised upon hearsay where there was no good cause for concealing the declarant's identity?

3. Whether petitioner Pisciotti's Sixth Amendment rights were presumptively violated because his trial counsel, who was under government investigation for obstructing justice in connection with the very crimes alleged in the indictment, was laboring under an actual conflict of interest?

4. Whether the Trial Court allowed the government to exceed the bounds of permissible expert testimony when it allowed an FBI agent to testify in statutory language indicating guilt, thereby bolstering the credibility of the government's linchpin fact witnesses?

List of Parties

Petitioners were indicted with Paul R. Vitarelli, Robert A. Giacomi, Jack R. Giacomi, Jeffrey P. Santopietro, Thomas E. Porzio and Fred L. Giusti. Petitioners stood trial with all of their co-defendants except for Jeffrey P. Santopietro and Thomas E. Porzio, who were severed and ultimately entered into plea agreements with the government.

Table of Contents

Questions Presented i

List of Parties ii

Opinions Below 1

Jurisdiction 2

Constitutional and Statutory Provisions 2

Statement of the Case 2

Statement of Facts 6

Jurisdiction in the Original Court 10

Reasons For Granting The Writ 10

1. Petitioners Received Improper Upward Departure Sentences Because the Lower Courts Misconceived the Interplay Between Guidelines § § 5K2.7 and 2C1.1, An Issue of First Impression for This Court 10

2. Petitioners' Sentence Enhancements for Justice Obstruction Were Erroneous Because, *Inter Alia*, the Lower Courts' Reading of the Guidelines Permits an Enhancement Without Any Showing of "Material Hindrance" of the Offender's Investigation, Prosecution, or Sentencing 16

3. Pisciotti's Sixth Amendment Rights Were Presumptively Violated, and His Conviction Must be Reversed, Because His Attorney was Laboring Under an Actual Conflict of Interest 20

4. There Must be a New Trial Because a Government Expert was Allowed Improperly to Bolster the Credibility of its Linchpin Fact Witnesses by Testifying in Statutory Language Indicating Guilt 26

5. Pursuant to Rule 12.2 of This Court, Petitioners Join in the Arguments Contained in the Petitions Submitted by Their Codefendants Insofar as They Are Applicable to Petitioners . . 30

Conclusion 30

Appendix A -- Opinion of the United States Court of Appeals 1a

Appendix B -- Order of the United States Court of Appeals On Petition for Rehearing and Suggestion for Rehearing In Banc 11a

Appendix C -- Constitutional and Statutory Provisison 13a

Table of Authorities

Cases:

Bellamy v. Cogdell, 974 F.2d 302 (2d Cir. 1992) (*in banc*), *cert. denied*, __ U.S. __, 113 S.Ct. 1383 (1993) 5

Hygh v. Jacobs, 961 F.2d 359 (2d Cir. 1992) 28

In Re Mann, 728 F.Supp. 60 (D.Me. 1990) 19

Solina v. United States, 709 F.2d 160 (2d Cir. 1983) 5, 22, 23

United States v. Aiello, 900 F.2d 528 (2d Cir. 1990) 6, 24, 25

United States v. Barnett, 939 F.2d 405 (7th Cir. 1991) 4, 18, 19

United States v. Barone, 913 F.2d 46 (2d Cir. 1990) 13, 14

United States v. Bilzerian, 926 F.2d 1285 (2d Cir.), *cert. denied*, __ U.S. __, 112 S.Ct. 63 (1991) 27

United States v. Burns, 893 F.2d 1343 (D.C. Cir. 1990), *rev'd. on other grounds*, __ U.S. __, 111 S.Ct. 2182 (1991) 14

United States v. Calandra, 414 U.S. 338, 94 S.Ct. 613 (1974) 19

United States v. Cancilla, 725 F.2d 867
(2d Cir. 1984) 5, 21-25

United States v. Cruz, 981 F.2d 659
(2d Cir. 1992) 28, 29

United States v. Dunnigan, U.S. ,
113 S.Ct. 1111 (1993) 4, 16, 19, 20

United States v. Eisen, 974 F.2d 246
(2d Cir. 1992), *cert. denied*, __ U.S. __,
113 S.Ct. 1840 (1993) 6, 24, 25

United States v. Fatico, 579 F.2d 707
(2d Cir. 1978) 19, 20

United States v. Fulton, __ U.S. __,
Nos. 91-1048 and 92-2105 (2d Cir.
September 22, 1993) 5, 23, 24

United States v. Hudson, 972 F.2d 504
(2d Cir. 1992) 15

United States v. Jones, 900 F.2d 512
(2d Cir.), *cert. denied*, __ U.S. __,
111 S.Ct. 131 (1990) 6, 24, 25

United States v. Kim, 896 F.2d 678
(2d Cir. 1990) 16

United States v. Locascio and Gotti,
__ U.S. __, Nos. 92-1382, 1384, 1671,
93-1181 (2d Cir. October 8, 1993) 5

United States v. Riviere, 924 F.2d 1289
(3rd Cir. 1991) 14

United States v. Rodriguez, 942 F.2d 899
(5th Cir. 1991), *cert denied*, __ U.S. __,
112 S.Ct. 990 (1992) 4, 18

United States v. Rodriguez, 968 F.2d 130
(2d Cir.), *cert. denied*, __ U.S. __,
113 S.Ct. 140 (1992) 6, 16

United States v. Schwartz, 924 F.2d 410
(2d Cir. 1991) 29

United States v. Scop, 846 F.2d 135
(2d Cir.), *modified on other grounds*,
856 F.2d 5 (1988) 27, 28

United States v. Scop, 856 F.2d 5
(2d Cir. 1988) 29

United States v. Stephens, __ F.2d __,
No. 92-1553 (2d Cir. October 7, 1993) 15, 16

United States v. Stroud, 893 F.2d 504
(2d Cir. 1990) 17, 18

United States v. Urbanek, 930 F.2d 1512
(10th Cir. 1991) 4, 18

United States v. Williams, 952 F.2d 1504
(6th Cir. 1991) 4, 18

United States v. Young, 981 F.2d 180
(5th Cir. 1992), *reh'g denied sub nom.*,
985 F.2d 555, *cert. denied sub nom*,
__ U.S. __, 113 S.Ct. 2454 (1993) 20

United States v. Zackson, __ F.2d __,
No. 92-1525 (2d Cir. October 4, 1993) 6

Waterhouse v. Rodriguez, 848 F.2d 375
(2d Cir. 1988) 6

Statutes and Rules:

18 U.S.C. § 371 . . . . . 2, 3

18 U.S.C. § 665 . . . . . 2, 3

18 U.S.C. § 666 . . . . . 1-3, 7, 8, 10, 11, 26, 27, 29

18 U.S.C. § 872 . . . . . 2, 12

18 U.S.C. § 1344 1-3

18 U.S.C. § 1951 . . . . . 2, 12

18 U.S.C. § 3231 . . . . . 2, 10

26 U.S.C. § 7201 . . . . . 2, 3

28 U.S.C. § 1254 2

Sup.Ct.R. 12.2 . . . . . 2, 30

Sup.Ct.R. 14.1(f) 2

U.S. Const. amend. V 2

U.S. Const. amend. VI . . . . . i, 2, 3, 5, 20, 21, 23

U.S.S.G. § 2C1.1 . . . . . 2, 3, 10-12, 15

U.S.S.G. § 2C1.1, Application Note 5 . . . 2, 3, 11, 12, 15

U.S.S.G. § 3C1.1 . . . . . 2, 4, 17

U.S.S.G. § 3C1.1, Application Note 3(d) 2, 4, 17, 18

U.S.S.G. § 5K2.0 . . . . . 2, 12

U.S.S.G. § 5K2.7 . . . . . i, 2-4, 10-16

U.S.S.G. § 6A1.3, Commentary 2, 19

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IN THE

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JOSEPH J. SANTOPIETRO, PERRY A. PISCIOTTI,

Petitioners,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Joseph J. Santopietro and Perry A. Pisciotti respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on June 9, 1993, affirming their convictions for bribery (18 U.S.C. § 666), bank fraud (18 U.S.C. § 1344), and related offenses.

Opinions Below

The unreported opinion of the Court of Appeals is reprinted in the Appendix at pages 1a to 10a. The order of the Court of Appeals denying petitioners' petition for rehearing appears in the Appendix at pages 11a to 12a.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on June 9, 1993. On July 29, 1993, the Court of Appeals denied petitioners' timely petition for rehearing. This petition for a writ of certiorari timely followed within 90 days of that date. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions

Pursuant to Rule 14.1(f) of this Court, the provisions involved in this petition are set out verbatim in the Appendix at 13a to 27a. The citations to those provisions are:

U.S. CONST. amends. V, VI.

18 U.S.C. § § 371; 665; 666; 872; 1344; 1951; 3231.

26 U.S.C. § 7201.

28 U.S.C. § 1254(1).

U.S.S.G. § § 2C1.1; 2C1.1, Application Note 5; 3C1.1; 3C1.1, Application Note 3(d); 5K2.0; 5K2.7; 6A1.3, Commentary.

SUP. CT. R. 12.2; 14.1(f).

Statement of the Case

This case arises from an influence peddling scheme in Waterbury, Connecticut allegedly involving Santopietro, the former City Mayor, Pisciotti, the former City GOP chairman, and others. By this petition, Santopietro seeks review of the Second Circuit's affirmance of his conviction and 108 month

sentence for bribery conspiracies (18 U.S.C. § 371); receiving corrupt payments (18 U.S.C. § 666(a)(1)(B)); bank fraud (18 U.S.C. § 1344); embezzling federal grant monies (18 U.S.C. § 665(a)); and tax evasion (26 U.S.C. § 7201). Pisciotti seeks review of the Second Circuit's affirmance of his conviction and 114 month sentence for conspiracy (18 U.S.C. § 371); bribery (18 U.S.C. § 666(a)(2)); and bank fraud (18 U.S.C. § 1344).

As we demonstrate below, this petition raises issues of widespread importance in two of the most fundamental and most intensely litigated areas of criminal law: Guideline sentencing, and the Sixth Amendment right to effective counsel.

With respect to the sentencing issues, this case presents the Court with questions of first impression which, given the ubiquitous nature of the Guidelines, have nationwide significance. Specifically, this Court has never before interpreted the scope of Guideline § 5K2.7, which allows upward departures in cases involving "a significant disruption of governmental function," but discourages such departures where governmental interference "is inherent in the offense."

Here, governmental interference was inherent in the bribery guideline under which petitioners were sentenced. Hence, that Guideline provides for an eight point offense level increase for bribes paid to influence government officials. *See* Guideline § 2C1.14(b)(2)(B). Yet, despite the dictate of Guideline § 5K2.7, the Trial Court also imposed an upward departure for interfering with a governmental function: the very factor that motivated the offense level increase.

In so doing, the Court relied upon Application Note 5 to Guideline § 2C1.1, which authorizes upward departures for "systematic or pervasive corruption of a governmental function." Surely the imposition of both an upward adjustment and an upward departure for a single factor constituted impermissible double counting. But on a broader level, the Court's action reveals a fundamental tension between Application Note 5 and Guideline § 5K2.7. On the

one hand, the Application Note allows upward departures for corrupting a government function, even though this factor is inherent in the bribery guideline. But on the other hand, Guideline § 5K2.7 discourages those same departures when corrupting a government function is "inherent in the offense."

Given the proliferation of white collar prosecutions, this is a nettlesome, nuts-and-bolts issue of Guidelines interpretation which can only reoccur. Moreover, as this Court well knows, the lower courts must wrestle with these Guidelines on a daily basis. Thus, resolving here the apparent conflict between these provisions can only further the Guidelines' mission of promoting sentencing uniformity and predictability.

Another transcendent issue here concerns the justice obstruction enhancements imposed upon both petitioners under Guideline § 3C1.1. As evidenced by this Court's decision in *United States v. Dunnigan*, __ U.S. __, 113 S.Ct. 1111 (1993), this is an issue which confronts virtually every convicted defendant in every federal prosecution today. Here, as we explain below, Santopietro, in contrast to *Dunnigan*, received the two point adjustment even though his alleged obstructionism in no way hindered his investigation, prosecution or sentencing. As detailed *infra*, we contend -- and many courts have held -- that, absent some "material hindrance," the enhancement is barred by Application Note 3(d) to the obstruction Guideline. *See, e.g., United States v. Barnett*, 939 F.2d 405 (7th Cir. 1991); *United States v. Urbanek*, 930 F.2d 1512 (10th Cir. 1991); *United States v. Rodriguez*, 942 F.2d 899 (5th Cir. 1991), *cert denied*, __ U.S. __, 112 S.Ct. 990 (1992); *United States v. Williams*, 952 F.2d 1504 (6th Cir. 1991). To clarify the potentially horizonless scope of Guideline § 3C1.1 in light of *Dunnigan*, we respectfully ask the Court to decide here whether some showing of "material hindrance" is required for a justice obstruction adjustment.

With respect to the Sixth Amendment issue, we demonstrate that Pisciotti was represented by a trial attorney who was involved in obstructing justice with respect to the very offenses of which Pisciotti stood accused. Prior its decision in this case -- and subsequently, as well -- the Second Circuit held that such actual attorney conflicts constitute a *per se* Sixth Amendment violation, requiring automatic reversal and a new trial. *See, e.g., United States v. Cancilla,* 725 F.2d 867 (2d Cir. 1984); *Solina v. United States*, 709 F.2d 160 (2d Cir. 1983); *United States v. Fulton,* __ U.S. __, Nos. 91-1048 and 92-2105 (2d Cir. September 22, 1993) (reversing and remanding for new trial where government witness previously had imported heroin for defendant's trial counsel). *Cf. United States v. Locascio and Gotti*, __ U.S. __, Nos. 92-1382, 1384, 1671, 93-1181 (2d Cir. October 8, 1993) (affirming disqualification of trial counsel on ground of apparent conflict of interest).

As we demonstrate below, there can be no principled distinction between the instant case and these governing authorities. Yet here, the Court afffirmed Pisciotti's conviction summarily, without passing on the merits of his Sixth Amendment claim, and without a hint of legal analysis as to what makes this case different from the *per se* reversal cases just cited.

With the utmost respect to the Second Circuit, we submit that actually conflicted counsel is tantamount to no counsel at all. The right to uncompromised legal representation is perhaps the most vital right in our justice system. Yet, the scenario of a conflicted advocate arises with surprising -- and disheartening -- frequency.[1] Thus, by

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[1] In the Second Circuit alone, our research reveals numerous direct appeals involving ineffective assistance claims in recent years. *See supra and authorities cited. See also Bellamy v. Cogdell,* 974 F.2d 302 (2d Cir. 1992)(*in*

(continued...)

hearing, and reversing, Pisciotti's case, the Court can give the lower courts a ready means for disposing of such cases: a bright line rule that anything less than conflict-free representation is constitutionally unacceptable, and cannot be tolerated.

Statement of Facts

This is a case about alleged political corruption. In essence, there were two separate theories of prosecution. *First*, the government contended that Waterbury Mayor Joseph Santopietro and the other City official codefendants had been coopted by various real estate developers for assistance with zoning and other legislative or administrative decisions. This part of the case also included allegations of bank fraud. *Second*, the government contends that Santopietro embezzled funds from a federally funded job training program. Only Santopietro was charged with this part of the government's case.

The Corrupt Payments Portion of the Case

As we argued below, there were fundamental weaknesses in this part of the government's case. Paramount

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[1](...continued)
banc), *cert. denied*, __ U.S. __, 113 S.Ct. 1383 (1993) (habeas case); *United States v. Eisen*, 974 F.2d 246 (2d Cir. 1992), *cert. denied*, __ U.S. __, 113 S.Ct. 1840 (1993); *United States v. Jones*, 900 F.2d 512 (2d Cir.), *cert. denied*, __ U.S. __, 111 S.Ct. 131 (1990); *United States v. Aiello*, 900 F.2d 528 (2d Cir. 1990) (habeas case); *Waterhouse v. Rodriguez*, 848 F.2d 375 (2d Cir. 1988) (habeas case); *United States v. Rodriguez*, 968 F.2d 130 (2d Cir.), *cert. denied*, __ U.S. __, 113 S.Ct. 140 (1992); *United States v. Zackson*, __ F.2d __, No. 92-1525 (2d Cir. October 4, 1993).

among these was the fact that the illegality of the various transactions was contingent upon the jury believing the testimony of accomplice witnesses with severe credibility problems. We do not dispute that the monies received by Santopietro and other codefendant City officials often came to them through a rather tortuous path. But, regardless of any suspicious circumstances associated with any particular payments, the testimony of the accomplice witnesses was necessary to render them illegal. Given this fundamental fact, it cannot be said that the evidence of guilt was overwhelming.

This was not a case where the government claimed that there was a *quid pro quo* between any particular payment and any particular government action. Rather, as accomplice witness Richard Barbieri, the former President and Chief Executive Officer of Security Savings and Loan ("Security") (A: 724-25)[2], testified, he met with petitioners at a crowded restaurant[3] after Santopietro's election, at which time the alleged conspiracy was hatched. (A: 738-39)

This was the alleged corrupt agreement, and it did not involve direct payment of monies for any particular action. (A: 905) Thus, with respect to the charges of corrupt payments in violation of 18 U.S.C. § 666, there was never a claim that particular monies were paid to Santopietro or the other defendants in return for specific actions. Hence, the fact that Santopietro or the other city official defendants received monies through Pisciotti could only be rendered criminal by the alleged original agreement of corrupt cooperation.

In other words, there is no dispute that Pisciotti paid money, and that Santopietro and the other City official

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[2] Numbers preceded by the letter "A" refer to pages of the Joint Appendix submitted to the Court of Appeals; those preceded by dates refer to pages of the trial transcript not included in that Appendix.

[3] Significantly, this testimony was never corroborated.

defendants received it. But the mere payment of money to, or receipt of it by, an elected official does not violate 18 U.S.C. § 666. Rather, by the express terms of the statute, the payment must be "corrupt."

Here, the only proof of corruption came from the government's accomplice witnesses, bank officials Richard Barbieri and John Corpaci. Both of these officials had committed numerous frauds beyond those alleged in the indictment, and therefore came before the jury with all of the credibility problems associated with accomplice witnesses. Accordingly, this part of the government's case cannot be viewed as overwhelming.

The Bank Fraud Portion of the Case

Count Five of the indictment charged Mayor Santopietro with fraudulently securing a loan by concealing the fact that the proposed guarantor had been promised a hold-harmless agreement. (A: 51-52) Like the § 666 charges, this charge rested solely upon Barbieri's testimony that had he known about the hold-harmless agreement, he would not have accepted the guarantor.

Count Six alleged that petitioners defrauded Security by obtaining an $85,000 loan for "property improvements" when in fact $63,000 of the money went to Santopietro, who then repaid other outstanding loans. This charge also depended upon Barbieri's credibility. This is so because the loan application was signed not by petitioners, but by accomplice witness Scott Miele. And Miele testified that he merely signed the application at Pisciotti's request, and did not discuss it with him. (3/10: 177)

Hence, the only testimony which tied Pisciotti and Santopietro to the false statement on the bank loan was Barbieri's testimony that, "[w]e discussed the purpose. We really didn't come to a conclusion as to the purpose of a loan. I put down on the application that it was for property improvements." (3/6: 80)

BEST AVAIL

The DEEGA Counts

The next part of the case (Counts 14-22) alleged that Santopietro, and not the other defendants, had embezzled funds from the Department of Employment, Education and Grants ("DEEGA"), Waterbury's agency for administering federal money from programs such as the Job Training Partnership Act and the Stewart McKinney Homeless Assistance Grants. (A: 61-70) In essence, the government contended that Santopietro misspent some of these funds in the course of undertaking duties legitimately financed by DEEGA.

The defense to this charge was that Santopietro, who initiated the very special review which uncovered corruption in the DEEGA program, had not willfully misapplied funds. Rather, Santopietro, a man with no legal and accounting experience, had appropriately relied upon the myriad federal, state and local auditors and experts overseeing this money. None of these people voiced any concern about Santopietro's conduct during his six year tenure as Mayor. (3/30: 139-41) Moreover, the Mayor had a $15,000 discretionary fund for travel and official expenses which could have been used to reimburse DEEGA for any questionable expenses. (A: 1834-36) The availability of this fund offered strong proof that any improprieties with respect to Mayor Santopietro and DEEGA were not willful.

In opposition to the Mayor's claims, the government offered the testimony of accomplice witnesses who insisted that the Mayor was aware of his wrongdoing with respect to the DEEGA funds. Once again, then, these counts came down to a question of credibility.

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The Tax Counts

Finally, Counts 28 and 29 charged Mayor Santopietro with tax evasion arising from the alleged corrupt payments he received in violation of 18 U.S.C. § 666. Thus, if the monies were in fact corrupt payments, there was tax evasion. But if, as Santopietro claims, the money consisted of loans and gifts, no crime was committed.

Conclusion

Petitioners' decision not to challenge the sufficiency of the evidence below was not a concession of guilt. Rather, it was a recognition that the government is blessed with every favorable factual inference on appeal. From the jury's perspective, though, this case, wholly contingent as it was on credibility determinations, was a very close one.

Jurisdiction in the Original Court

The District Court had jurisdiction under 18 U.S.C. § 3231.

REASONS FOR GRANTING THE WRIT

I

Petitioners Received Improper Upward Departure Sentences Because the Lower Courts Misconceived the Interplay Between Guidelines § § 5K2.7 and 2C1.1, An Issue of First Impression for This Court

A. The Basis for Petitioners' Sentences

For Santopietro, the District Court ultimately arrived at an offense level of 31, and imposed a 108 month sentence. The Court calculated the sentence pursuant to Guideline §

2C1.1, which sets a base offense level of 10 for the § 666 offenses, and provides for an eight point increase if "the offense involved a payment for the purpose of influencing an elected official." In reaching the ultimate offense level of 31, the Court, *inter alia*, upwardly departed four levels on the ground that Santopietro's crime had involved a disruption of governmental function.

As for Pisciotti, the Court also arrived at an ultimate offense level of 31, but sentenced him to 114 months imprisonment. Like Santopietro, Pisciotti was sentenced under § 2C1.1. But instead of the eight point increase because "the offense involved a payment for the purpose of influencing an elected official," Pisciotti's offense level was adjusted by 10 points upon a finding that the financial benefit he had secured warranted an extra increase under § 2F1.1's table for "Fraud and Deceit." In reaching Pisciotti's ultimate offense level of 31, the Court, *inter alia*, upwardly departed three levels on the ground that his crime also had involved disruption of a government function.

On this POINT, we argue that the upward departures violated Guideline § 5K2.7. Moreover, we show that the Court's construction of Application Note 5 to Guideline § 2C1.1 -- upon which it relied in departing upward -- conflicts with § 5K2.7 on its face. This apparent contradiction has never before been addressed by this Court, and should be resolved here.

B. The Upward Departures Fail to Conform to the Guidelines, and Create an Inconsistency Within Them

As noted, §2C1.1(b)(2)(B) authorizes an eight level adjustment where "the offense involved a payment for the purpose of influencing an elected official." Nevertheless, the District Court made an additional departure on the ground that petitioners' offenses involved a disruption of government function. In departing upward, the District Court relied upon

Application Note 5 to § 2C1.1, which states: "Where the Court finds that the defendant's conduct was part of a systematic or pervasive corruption of a governmental function, process or office that may cause loss of public confidence in government, an upward departure may be warranted." We proceed to show that the District Court's interpretation of Application Note 5 was erroneous, and cannot be squared with § 5K2.7.

It is important to recognize that not all crimes covered by § 2C1.1 inherently disrupt government functions. For example, § 2C1.1 also applies to extortion by government officials, which does not *necessarily* have any effect upon the governing process. *See* 18 U.S.C. §§ 872 and 1951. Plainly, then, Application Note 5 speaks to the situation where crimes such as extortion effect, as a factual matter but not inherently, governmental functions. Thus, under § 2C1.1, a conviction under 18 U.S.C. § 1951 for extortion under color of official right would yield a base offense level of just 13 if less than $10,000 had been extorted. If, however, that extortion had a significant effect upon governmental processes, a more severe sentence might be in order.

The situation is far different, however, where the crime at issue is bribery of an elected official. In that circumstance, the Guidelines themselves provide for a sentence enhancement. Specifically, as noted, § 2C1.1(b)(2) imposes an eight point enhancement where, as here, the defendant was convicted for receiving corrupt payments while serving as an elected official.

For this reason, Application Note 5 to § 2C1.1 directs the reader to § 5K2 of the Guidelines, which unequivocally does *not* support the action taken by the District Court. Section 5K2.0 states:

> Where, for example, the applicable offense guideline and adjustments do take into consideration a factor listed in this subpart,

> departure from the applicable guideline range is warranted only if the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense. Thus, *disruption of a governmental function, § 5K2.7, would have to be quite serious to warrant departure from the guidelines when the applicable guideline is bribery or obstruction of justice.*

(Emphasis supplied)

Continuing in this vein, § 5K2.7 states:

> If the defendant's conduct resulted in a significant disruption of governmental function, the court may increase the sentence above the authorized guideline range to reflect the nature and extent of the disruption and the importance of the governmental function affected. *Departure from the guidelines ordinarily would not be justified when the offense is an offense such as bribery or obstruction of justice; in such cases interference with a governmental function is inherent in the offense, and unless the circumstances are unusual the guidelines will reflect the appropriate punishment for such interference.*

(Emphasis supplied)

This case notwithstanding, the lower courts have remained faithful to the mandate of § 5K2.7. In *United States v. Barone*, 913 F.2d 46 (2d Cir. 1990), the Court reversed the District Court's upward departure based upon the fact that the defendant, a local judge, had disrupted governmental functions by giving false grand jury testimony:

> Section 5K2.7 states that the court may increase a sentence above the guideline range "[i]f the defendant's conduct resulted in a significant disruption of a governmental function" (emphasis added). Yet, the section states further that "[d]eparture from the guidelines ordinarily would not be justified when the offense of conviction is an offense such as bribery or obstruction of justice; in such cases interference with a governmental function is inherent in the offense...." As a consequence, the government cannot argue that § 5K2.7 justifies a departure based upon Barone's perjury in front of the grand jury, for interference with a government function is inherent in that offense.

913 F.2d at 51; *see United States v. Burns*, 893 F.2d 1343, 1347 (D.C. Cir. 1990), *rev'd. on other grounds*, __ U.S. __, 111 S.Ct. 2182 (1991) ("disruption of government function is an inherent aspect of crimes such as bribery"); *United States v. Riviere*, 924 F.2d 1289, 1308 (3rd Cir. 1991) (no departure under §5K2.7 because disruption of government function is inherent in crime of assaulting a marshal).

Barone and the other cases cited above surely preclude the action taken here by the District Court -- especially in a case where there was no proof that any pressure was ever exerted upon any City official.[4] Plainly, absent such proof,

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[4] Waterbury City Planner Anthony Mirto testified that, in contrast to past mayors during his 35 year tenure with the City, Santopietro had *never* sought to influence him. (3/25: 104) Moreover, the only other City official called by the government was former Alderman and present Congressman Gary Frank. *Frank testified that petitioners had never sought*

(continued...)

there is nothing so unusual about this case as to make the applicable Guideline inappropriate. Yet, the Court of Appeals, without explanation, ignored this authority.

What makes this silence so troubling is that affirming here reads an irreconcilable contradiction into the Guidelines. For accepting the District Court's reasoning permits an upward departure from the Bribery Guideline in spite of § 5K2.7's clear mandate that departures are inappropriate for crimes such as bribery, where government interference inheres in the offense. Indeed, rejecting our view of Application Note 5 -- that it applies only to crimes involving government interference as a factual, but not an inherent, matter -- creates an intolerable conflict between the two provisions. Worse, the District Court's ruling opens the door to impermissible double counting -- a "two-fold upward adjustment," *United States v. Hudson*, 972 F.2d 504, 507 (2d Cir. 1992) -- in every case of official bribery.

This is a significant and disturbing result. But the Second Circuit inexplicably failed to address it. This being so, we respectfully submit that the District Court's ruling is ripe for consideration by this Court, and should not be left to stand.

Finally, even if some departure here were permissible, the Trial Court failed to follow the appropriate procedure in departing upward. In *United States v. Stephens*, __ F.2d __, No. 92-1553 (2d Cir. October 7, 1993), the Court vacated a sentence imposed by the very judge who tried this case because "the district court did not articulate its reasons for upwardly departing by five levels instead of by some lesser number." Slip. op. at 6469. Similarly, here, the Trial Court simply stated that it was upwardly departing "by four levels in reliance upon both section 2C1.1, application note five, and

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[4](...continued)
to influence him in his capacity as a zoning commissioner. (3/16: 255; 282)

on Section 5K2.7." (*See* A: 2360-62) As in *Stephens*, then, the same judge made the same error of failing to explain why he had selected a four level departure instead of some other amount. Yet, Stephens' sentence stands vacated, while Santopietro's and Pisciotti's stand affirmed. For this reason alone, the upward departures must fall.[5]

II

Petitioners' Sentence Enhancements for Justice Obstruction Were Erroneous Because, *Inter Alia*, the Lower Courts' Reading of the Guidelines Permits an Enhancement Without Any Showing of "Material Hindrance" of the Offender's Investigation, Prosecution, or Sentencing

The Trial Court also increased both petitioners' offense levels by two points upon a finding that they each had obstructed justice. The Court of Appeals' unexplained affirmance of these adjustments also contravened governing law. Moreover, this Court's recent opinion in *United States v. Dunnigan, supra,* makes clear that virtually any convicted defendant who testifies in his own behalf stands a very real chance of receiving the enhancement. Given this fact, and the fact that we present here a novel question of interpreting the obstruction Guideline, this is a case which begs for review by this Court.

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[5] We raised this argument below citing extant authority. *See United States v. Kim*, 896 F.2d 678 (2d Cir. 1990); *United States v. Rodriguez, supra.*

A. Santopietro

Santopietro received the enhancement upon a finding that, during the execution of a search warrant at his office, he temporarily secreted a briefcase which was turned over to the government "within minutes," with its contents intact. (A: 89-91)

Guideline § 3C1.1 permits a two level enhancement if the defendant "*willfully* obstructed or impeded, or attempted to obstruct or impede, the administration of justice...." (Emphasis supplied) However, Application Note 3(d) recognizes that, in certain situations, concealing evidence may not rise to the level of "willfully" obstructing justice. Specifically, Note 3(d) provides that

> if such conduct [destroying or concealing evidence] occurs contemporaneously with arrest ... it shall not, standing alone, be sufficient to warrant an adjustment for obstruction *unless it resulted in a material hindrance* to the official investigation or prosecution of the instant offense or the sentencing of the offender.

(Emphasis supplied)

We realize that this exception is expressly confined to evidence concealed "contemporaneously with arrest." Nonetheless, the rationale behind the exception, as well as the lower court decisions, dictates that it also be applied to evidence concealed during a search.

In *United States v. Stroud*, 893 F.2d 504, 507 (2d Cir. 1990), the Court held that the term "willfully" as used in § 3C1.1 "requires that the defendant consciously act with the *purpose* of obstructing justice." 893 F.2d at 507 (Emphasis in original). In so doing, it drew a clear distinction between

an intentional effort to undermine an investigation, and a reflexive desire to avoid apprehension. 893 F.2d at 508. On this reasoning, the Court vacated the enhancement imposed upon the defendant, who had led the police on a lengthy chase when they tried to arrest him. 893 F.2d at 505.

The exception in Note 3(d), enacted subsequent to *Stroud*, plainly codifies the Second Circuit's holding. Thus, like *Stroud*, the exception acknowledges that a defendant who conceals evidence during arrest is motivated more by self-preservation than any conscious "*purpose* of obstructing justice." 893 F.2d at 507 (Emphasis in original). The same instinct is aroused when the Government appears at a defendant's door with a search warrant. In both scenarios, discovery of illegal evidence would have identical consequences: certain prosecution and likely incarceration. For all practical purposes, then, the situation confronting Mayor Santopietro on the day of the search was indistinguishable from that faced by a suspect during arrest. Under the rationale of *Stroud*, there can be no basis for applying the exception to one situation and not the other. Surprisingly, the Court of Appeals did not even comment on this meritorious claim.

The question thus becomes whether the minutes-long concealment of the briefcase "materially hindered" the investigation. *See* Note 3(d). In parallel situations, the Circuit Courts have found no "material hindrance." *See, e.g., United States v. Barnett, supra*, 939 F.2d at 407 (rejecting enhancement where defendant who promptly recanted false denial of guilt did not "cause investigators to expend any additional resources on their investigation"); *United States v. Urbanek, supra*, 930 F.2d at 1515 (vacating enhancement where defendant recanted alias on the spot and therefore "did not significantly impede or obstruct the investigation."). *Accord, United States v. Rodriguez, supra* (same); *United States v. Williams, supra*, 952 F.2d at 1516 "a defendant's

false statements must in some active way hurt or retard an investigation.").

To support a finding of "material hindrance," then, the defendant's obstructionism must have caused the Government to spend "additional resources" on the investigation. *United States v. Barnett, supra,* 939 F.2d at 407. Here, no "additional resources" could have been spent because the government left Mayor Santopietro's office with the briefcase. To clarify that the potentially limitless scope of *United States v. Dunnigan, supra,* does not reach this circumstance, we respectfully request that the Court hear this case.

B. Pisciotti

Pisciotti's sentence was enhanced upon a finding that he influenced the testimony of his sister, Edith Perugini. (A: 2265-66) However, the sole evidence supporting this allegation was rank hearsay -- an out-of-court statement by an employee of the United States Attorney. (A: 2264-66) Moreover, the lone reason proffered by the government for withholding the witness' identity was that "she was concerned about -- she asked that her name be, you know, left out of the proceedings." (A: 2266-67)

Absent some "good cause for [this] nondisclosure," there can be no doubt that the Sentencing Court's reliance on the hearsay was impermissible. *See* Commentary to Guideline § 6A1.3 *(quoting United States v. Fatico,* 579 F.2d 707 (2d Cir. 1978)). Simply put, a unilateral choice by a prosecutorial employee not to testify cannot be "good cause." *Cf. United States v. Calandra,* 414 U.S. 338, 345, 94 S.Ct. 613, 618 (1974) (burden, embarassment, social and economic injury not good cause for non-compliance with Grand Jury subpoena); *In Re Mann,* 728 F.Supp. 60, 61 (D.Me. 1990) (witness who ignored trial subpoena for "his own personal reasons" held in contempt for want of "adequate excuse" pursuant to Fed. R. Crim. P. 17 (g)). *Contrast Fatico, supra,* 579 F.2d at 710

(finding "good cause" for concealing informant's identity because of "past murders of informants who implicated organized crime members").

More fundamentally, though, the District Court's uncritical acceptance of the hearsay -- and the Second Circuit's failure to redress it -- offended Pisciotti's Due Process and Confrontation rights. *See, e.g., Fatico, supra,* 579 F.2d at 713 (Due Process clause obtains at sentencing) (collecting Supreme Court cases); *United States v. Young,* 981 F.2d 180, 188 (5th Cir. 1992), *reh'g denied sub nom.,* 985 F.2d 555, *cert. denied sub nom,* __ U.S. __, 113 S.Ct. 2454, 2983 (1993) (restricted Confrontation right applies at sentencing). Simply as a matter of fairness, this Court should remedy these violations by hearing this case and reversing.[6]

III

Pisciotti's Sixth Amendment Rights Were Presumptively Violated, and His Conviction Must be Reversed, Because His Attorney was Laboring Under an Actual Conflict of Interest

Approximately one week into the trial, Pisciotti replaced his lawyer, Paul Yamin, with another lawyer, Timothy Moynahan. At Pisciotti's sentencing, the government revealed its view that Yamin had been operating under an actual conflict of interest. Specifically, the government contended that Yamin was involved in an obstruction of justice stemming from the very crimes for

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[6] Parenthetically, we note that there is a world of difference between a finding by the Trial Judge that the defendant testified untruthfully -- the *Dunnigan* scenario -- and a second-hand allegation by a government employee who wants to remain anonymous. The Court should spell out that difference here.

which Pisciotti stood trial. Given this *per se* Sixth Amendment violation, automatic reversal was required by *United States v. Cancilla*, *supra*, and its progeny. But without even attempting to distinguish its own precedents, the Court of Appeals dismissed Pisciotti's ineffective assistance claim without comment. Because the right to conflict-free counsel is of such elemental importance, this summary dismissal deserves close scrutiny from this Court.

A. The Relevant Facts

As stated, Pisciotti's sentence was enhanced on the ground that he allegedly counseled the testimony of his sister, Edith Perugini. In arguing for that enhancement, the prosecutor made clear that she viewed Yamin as an active participant in the alleged justice obstruction:

> First of all, we don't claim that [at] the eleventh hour Mr. Pisciotti began to try to alter Mrs. Perugini's testimony. I think it's clear from the Grand Jury transcripts that the attempt to alter, soften, and blur Mrs. Perugini's testimony began between the time that she spoke to the agents at her home and the time *when she appeared at the Grand Jury – with Mr. Pisciotti's lawyer and a statement that Mr. Pisciotti's lawyer had written for her to tell her what the version of the events was.*
>
> * * *
>
> Just one final thing, Your Honor. That is, we might well not be here if the meeting [during trial] hadn't taken place, because at that point we acquired evidence of Mr. Pisciotti's personal involvement in what we believed had been an ongoing involvement in what we

> believed had been an ongoing effort to shape Mrs. Perugini's testimony. *I think it would not have been fair to tax Mr. Pisciotti himself with what we believed at the time of the Grand Jury was primarily the actions of his lawyer.*

(A: 2281; 2287) (Emphasis supplied)

Thus, there can be no doubt that, at the time of trial, the government believed that Yamin had been involved in obstructing justice with respect to the very allegations against which he was defending Pisciotti.

B. The Governing Law

In *United States v. Cancilla*, *supra*, the Court reversed Peter Cancilla's mail fraud conviction in light of the revelation that the government

> had learned ... that Peter Cancilla's trial counsel may have himself conspired with someone connected to the Cancilla schemes on similar fraudulent insurance claims involving cars owned by counsel.

725 F.2d at 868.

Following its prior decision in *Solina v. United States*, *supra*, where the Court found a *per se* Sixth Amendment violation because the defendant had been represented by an unlicensed lawyer, the Court stated:

> [W]ith the similarity of counsel's criminal activities to Cancilla's schemes and the link between them, it must have occurred to counsel that a vigorous defense might uncover

> evidence or prompt testimony revealing his own crimes, even more so than in *Solina*. It is noteworthy that Cancilla, on advice of his counsel, chose not to present a defense. Moreover, representation of Cancilla in ways other than by a vigorous defense may have been affected. It is difficult to see how counsel conflicted in this way could impartially have given Cancilla advice on whether or not to take a guilty plea, since counsel might have feared that acceptance of a plea would turn on Cancilla's cooperation, which might lead to discovery of the link to counsel's own activities. In such circumstances, proof of this type of conflict ... constitutes under *Solina* a per se violation of the Sixth Amendment right to effective assistance of counsel.
>
> ...What could be more of a conflict than a concern over getting oneself into trouble with criminal law enforcement authorities? The government appears to recognize this in describing the rationale of *Solina* as "the danger that the person acting as a lawyer might fear that a vigorous defense might cause the court or the government to inquire into his background and learn of his criminal activity." As indicated above, there were similar, probably greater, dangers here because the very evidence at trial or in plea negotiations might well lead to discovery of the attorney's prior criminal activity.

725 F.2d at 870. *Accord, United States v. Fulton, supra* (reversing and remanding for new trial where government

witness previously had imported heroin for defendant's trial counsel).

In essence, *Cancilla*'s progeny make clear that there is no bright-line rule to determine when the *per se* rule should apply. *United States v. Aiello, supra*, 900 F.2d at 532. But in assessing the facts of each case, certain considerations are deemed paramount.

First, the attorney's possible criminal exposure must be related to the crimes of which the defendant is accused. *See United States v. Eisen, supra*, 974 F.2d at 274; *United States v. Jones, supra*, 900 F.2d at 519.

Second, the basis for the attorney's potential criminal liability must not be fanciful. *United States v. Jones, supra*, 900 F.2d at 519.

Third, where the prosecutor investigating the attorney is also the attorney's adversary in the case on trial, it is far more likely that the attorney's conduct is tied to an effort to "please or impress" the prosecutor. *See, e.g., United States v. Eisen, supra*, 974 F.2d at 264; *United States v. Aiello, supra*, 900 F.2d at 531-32.

Here, as in *Fulton, supra*, all of these factors were present. Yet, the Second Circuit automatically reversed the one, but dismissed the other without comment. This dichotomy should trouble the Court because, as we demonstrate immediately below, there can be no colorable distinction between this case and the governing authorities.

C. Application of the Law to the Facts

Cancilla is virtually indistinguishable from this case. *First*, as in *Cancilla*, there is a direct correlation between the charges against Pisciotti and the allegations against Yamin. As such, "it must have occurred to counsel that a vigorous defense might uncover evidence or prompt testimony revealing his own crimes...." *Cancilla, supra*, 725 F.2d at 870.

Second, there was much more than "credible evidence," *United States v. Jones, supra*, that Yamin was involved in the purported justice obstruction. Indeed, the District Court stated that it "would have no difficulty making" a finding that Pisciotti's obstruction of justice dated back to Mrs. Perugini's Grand Jury testimony. (A: 2291) This statement, coupled with the prosecutor's claim that she believed Mrs. Perugini had testified falsely in the Grand Jury due "primarily [to] the actions of" Yamin, makes clear that Yamin was subject to a real and appreciable danger of prosecution.

Third, in contrast to cases such as *Aiello*, where the attorney allegedly feared prosecution in another district, Yamin stood to be prosecuted in the very same courtroom, by the very same prosecutor. *Contrast United States v. Eisen, supra*, 974 F.2d at 264 (No basis to conclude that defense attorney had motive "to please or impress [his potential] prosecutors *who did not participate in the Eisen case")* (Emphasis supplied).

Fourth, although *Cancilla*'s *per se* rule does not require Pisciotti to critique Yamin's performance, this performance supports the inference that he was seeking to protect himself at Pisciotti's expense. Of particular note is Yamin's shockingly incompetent effort to introduce Mrs. Perugini's grand jury testimony into evidence since it contained "many inconsistencies" *that were helpful to the prosecution*. (A: 166-67) Was Yamin seeking to help the prosecutor by offering into evidence prior consistent statements which the prosecutor could never have credibly offered? That this possibility exists is yet another reason why *Cancilla*'s *per se* rule should have been applied here.

In these circumstances, Yamin's representation was presumptively (and demonstrably) deficient, and Pisciotti's trial was presumptively unfair. Accordingly, this Court should grant certiorari and reverse his conviction.

IV

There Must be a New Trial Because a Government Expert was Allowed Improperly to Bolster the Credibility of its Linchpin Fact Witnesses by Testifying in Statutory Language Indicating Guilt

As explained in our Statement of Facts, the § 666 charges rested upon the suspect credibility of accomplice witnesses Richard Barbieri and John Corpaci. It is in this context that the District Court improperly permitted F.B.I. Special Agent Michael Clark[7] to express legal conclusions about the crimes allegedly committed by petitioners.

Specifically, Clark was permitted to give, *inter alia*, the following testimony, over defense objection:

> Q Now, you also referred, Mr. Clark, to the term corrupt payment. Do you recall that?
> A Yes.
> Q Is that a shorthand for something?
> A It is a shorthand for anything of value.
> Q And where was the term derived from, that is, where did it come from?

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[7] We acknowledge that the government did not call Clark as an expert. Nonetheless, he testified that he was an "expert on fraud" (A: 504), and the jury surely viewed him as such. Consequently, petitioners' rights here surely cannot hinge upon the magic words "qualified as an expert." Were it otherwise, the government could routinely call investigative agents without qualifying them as experts, and then ask them to opine on legal conclusions. As we will show, this result would rob the governing law of its force.

A *It comes from the statute which is Title 18, U.S. Code 666.*

(A: 666) (Emphasis supplied)

Hence, Clark was permitted to convey to the jury his conclusion that petitioners had been engaged in numerous illegal transactions, and had committed numerous violations of 18 U.S.C. § 666, the very crime with which they were charged. Under the Second Circuit's own precedents, the Trial Court's decision to permit this testimony was clear, reversible error. Here again, however, the Court of Appeals did not even address this claim.

"As a general rule an expert's testimony on issues of law is inadmissible." *United States v. Bilzerian*, 926 F.2d 1285, 1294 (2d Cir.), *cert. denied*, __ U.S. __, 112 S.Ct. 63 (1991). Hence, in *United States v. Scop*, 846 F.2d 135 (2d Cir.), *modified on other grounds*, 856 F.2d 5 (1988) (*"Scop II"*), the Court reversed mail fraud and securities fraud convictions because the trial court had permitted an expert witness to testify to his opinion that

> "... the stock of European Auto Classics was manipulated and that certain individuals were active participants and material participants in the manipulation of that stock. And that these individuals engaged in a manipulative and fraudulent scheme in furtherance of that manipulation."

846 F.2d at 138.

The Court reasoned that:

> Whitten made no attempt to couch the opinion testimony at issue in even conclusory factual

> statements but drew on the language of the statute and accompanying regulations concerning "manipulation" and "fraud." ... In essence, his opinions were legal conclusions that were highly prejudicial and went well beyond his province as an expert in securities trading. Moreover, because his opinions were calculated to "invade the province of the court to determine the applicable law and to instruct the jury as to that law," ... they could not have been helpful to the jury in carrying out its legitimate functions. "The admission of such testimony would give the appearance that the court was shifting to witnesses the responsibility to decide the case."

846 F.2d at 140 (Citations omitted). *Accord, Hygh v. Jacobs*, 961 F.2d 359 (2d Cir. 1992) (error to permit expert to express his opinion, *inter alia*, that defendant's conduct was not "'justified under the circumstances' and 'totally improper'.")

Beyond *Scop* and *Hygh*, *United States v. Cruz*, 981 F.2d 659 (2d Cir. 1992), reversed a narcotics conviction where an investigator's testimony parallelled that of a government informer about the particular transactions at issue in the case:

> [Al]though such expert testimony logically adds nothing to the believability of a witness's account (again absent a suggestion of implausibility), it strongly suggests to the jury that a law enforcement specialist ... believes the government's witness[ ] to be credible and the defendant to be guilty, suggestions we have previously condemned. *See United States v. Scop*, [*supra*,] 846 F.2d [at] 139-43....

981 F.2d at 663 (Footnote omitted). *Contrast United States v. Schwartz*, 924 F.2d 410 (2d Cir. 1991) (expert did not use statutory language or give statutory explanations).

Here, Agent Clark's testimony had the precise effect "condemned" by *Cruz*. Before he testified, there had been no mention of terms such as "corrupt payments" because the Trial Court had not permitted opening statements. Hence, the subsequent testimony of Barbieri and Corpaci was framed solely by the agent's characterization of the subject transactions as illegal, and his implicit conclusion that Barbieri and Corpaci were credible. This was unfair, reversible error, ignored by the Court of Appeals. Ironically, a different panel of the same Court had relied upon this very claim in granting petitioners bail pending appeal.

Moreover, Agent Clark's testimony was so prejudicial as to require a new trial on all counts of conviction. For, beyond his legal conclusions about the § 666 charges, Clark's testimony about money laundering also contained the conclusion that this crime involves "monies obtained through some type of illegal activity." (A: 666) Further, all of the charges in this case truned on the fundamental allegation that Santopietro was a "corrupt" mayor. Hence, when Agent Clark was permitted to testify, in essence, that the alleged payments to Santopietro were "corrupt" as a matter of law, he lent great credence to the government's entire case. Finally, since fraudulent intent was an element of all crimes charged in the indictment, Agent Clark's testimony served to supply proof of that element as to all counts. *See Scop II, supra*, 856 F.2d at 7 (reversing perjury counts in addition to fraud counts because "the improper ... testimony related to the perjury as well as conspiracy and mail and securities fraud charges").

In sum, this issue plainly should have been discussed by the Second Circuit, and should be reviewed by this Court.

V

Pursuant to Rule 12.2 of This Court, Petitioners Join in the Arguments Contained in the Petitions Submitted by Their Codefendants Insofar as They Are Applicable to Petitioners

Conclusion

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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On the Petition
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Appendix A
Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1333, 1489, 1334, 1326, 2335, 1490 - August Term, 1992

(Argued April 19, 1993 Decided June 9, 1993)

Docket Nos. 92-1334, 92-1349, 92-1356,
92-1357, 92-1380 and 92-1381

Filed: June 9, 1993

UNITED STATES OF AMERICA,

Appellee,

-against-

JEFFREY P. SANTOPIETRO, THOMAS E. PORZIO,

Defendants,

PAUL R. VITARELLI, JOSEPH J. SANTOPIETRO,
ROBERT A. GIACOMI, FRED L. GIUSTI and
JACK R. GIACOMI, and PERRY A. PISCIOTTI,

Defendants-Appellants.

Before:

PRATT and JACOBS, *Circuit Judges,* and
KNAPP, *District Judge*[*]

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[*] Hon. Whitman Knapp, Senior Judge, United States District Court for the Southern District of New York, sitting by designation.

Appendix A
Opinion of the United States Court of Appeals

Joseph J. Santopietro, Perry A. Pisciotti, Paul R. Vitarelli, Robert A. Giacomi, Jack R. Giacomi, and Fred L. Giusti appeal from judgments of conviction entered in the United States District Court for the District of Connecticut, T.F. Gilroy Daly, *Judge.* Defendants raise numerous challenges to their convictions and sentences.

All convictions affirmed; all sentences affirmed except Robert Giacomi's, which is vacated and remanded for resentencing.

JUDD BURSTEIN, New York, New York (Gerald L. Shargel, New York, New York, of Counsel), *for Defendants-Appellants Pisciotti & Santopietro.*

PATRICK TOMASIEWICZ, West Hartford, Connecticut (Fazzano & Tomasiewicz, of Counsel), *for Defendant-Appellant Vitarelli.*

DAVID A. MORAGHAN, Torrington, Connecticut, *for Defendant-Appellant Jack R. Giacomi.*

RICHARD S. CRAMER, Wethersfield, Connecticut, *for Defendant-Appellant Robert A. Giacomi.*

JULES SACH, New York, New York, *for Defendant-Appellant Giusti.*

Appendix A
Opinion of the United States Court of Appeals

HOLLY B. FITZSIMMONS, Assistant United States Attorney for the District of Connecticut (Albert S. Dabrowski, United States Attorney, Amy B. Lederer, Assistant United States Attorney, of Counsel), *for Appellee.*

PRATT, *Circuit Judge:*

FACTS AND BACKGROUND

Joseph J. Santopietro became the mayor of Waterbury, Connecticut, in November 1985. His victory was due in part to a feud between factions of the city's Democratic party, which had been in power for the previous ten years. The Republicans' uncertainty that they would be able to retain the power they had won fueled a "get it while we can" mentality among Santopietro and his close associates. Perry Pisciotti, a former GOP town chairman who was close to Santopietro's family, arranged for Santopietro to use his political position to influence decisions by various city agencies in return for bank loans and cash payoffs from certain local businessmen. Santopietro was reelected twice, and the conspiracy expanded in 1988 to include other Waterbury politicians.

Benefits to certain bankers and land developers included zoning changes, subdivision approvals, confidential appraisal information for use in bidding on city-owned property, expedited treatment from city agencies, and input into appointments. In return, Santopietro and other members of his administration received hundreds of thousands of dollars disguised as loans, sales of options, real estate contract cancellations, and property leases.

Following a five-week trial before T.F. Gilroy Daly, *Judge,* in the United States District Court for the District of

Connecticut, a jury found seven defendants guilty of conspiracy, bribery, and various counts of bank fraud, embezzlement, and tax evasion. Six of them have appealed.

Santopietro was convicted of bribery conspiracies, *see* 18 U.S.C. § 371; receiving corrupt payments, *see* 18 U.S.C. § 666(a)(1)(B); bank fraud, *see* 18 U.S.C. § 1344; embezzlement of federal grant monies, *see* 18 U.S.C. § 665(a); and tax evasion, *see* 26 U.S.C. § 7201. He was sentenced to 108 months' imprisonment, three years' supervised release, a $25,000 fine, and a $900 special assessment.

Pisciotti was convicted of conspiracy, *see* 18 U.S.C. § 371; bribery, *see* 18 U.S.C. § 666(a)(2); and bank fraud, *see* 18 U.S.C. § 1344. He was sentenced to 114 months' imprisonment, three years' supervised release, a $25,000 fine, and a $250 special assessment.

Paul Vitarelli, former president of Waterbury's Board of Aldermen, was convicted of conspiracy, *see* 18 U.S.C. § 371; receiving corrupt payments, *see* 18 U.S.C. § 666(a)(1)(B); and filing a false statement on his tax return, *see* 26 U.S.C. § 7206(1). He was sentenced to forty-one months' imprisonment, three years' supervised release, and a $150 special assessment.

Robert Giacomi, former majority leader of Waterbury's Board of Aldermen, was convicted of conspiracy, *see* 18 U.S.C. § 371; receiving corrupt payments, *see* 18 U.S.C. § 666(a)(1)(B); and filing a false statement on his tax return, *see* 26 U.S.C. § 7206(1). He was sentenced to fifty-one months' imprisonment, three years' supervised release, a $7500 fine, and a $150 special assessment.

Jack Giacomi, Waterbury's labor negotiator and brother of Robert Giacomi, was convicted of conspiracy, *see*

18 U.S.C. § 371; receiving corrupt payments, *see* 18 U.S.C. § 666(a)(1)(B); and filing a false statement on his tax return, *see* 26 U.S.C. § 7206(1). He was sentenced to eighteen months' imprisonment, three years' supervised release, a $4000 fine, and a $150 special assessment.

Fred Giusti, former majority leader of Waterbury's Board of Aldermen, was convicted of conspiracy, *see* 18 U.S.C. § 371; and receiving corrupt payments, *see* 18 U.S.C. § 666(a)(1)(B). He was sentenced to thirty-three months' imprisonment, three years' supervised release, and a $100 special assessment.

The defendants raise numerous issues on appeal, challenging various aspects of their trial and sentences. We have carefully considered all of the challenges to their convictions and concluded that none of them has any merit. We would affirm all of the judgments by summary order but for the existence of two sentencing issues that deserve brief comment: first, the imposition of a special skills enhancement to Robert Giacomi's sentence pursuant to U.S.S.G. § 3B1.3; second, the sentencing of Fred Giusti, who claims he received a "reward" rather than a "bribe", pursuant to U.S.S.G. § 2C1.1. For the reasons set forth below, we affirm all of the judgments except that with respect to Robert Giacomi we affirm the conviction but remand for resentencing.

DISCUSSION

A. Application of a Special Skills Enhancement to Robert Giacomi.

Robert Giacomi is a certified public accountant. The probation department's presentence report did not recommend

any adjustments that would reflect this fact. The government, however, objected to this omission and argued that Robert Giacomi had used his special accounting skills to prepare false tax returns for himself, Santopietro, and Jack Giacomi. The government urged the court to impose a two-level adjustment under § 3B1.3, "Abuse of Position of Trust or Use of Special Skill", which it did, increasing Giacomi's offense level from 20 to 22.

The § 3B1.3 enhancement was applied to Giacomi's sentence for the substantive bribery conviction, not to his sentence for filing a false tax return. His sentence for the bribery conviction was determined under § 2C1.1 -- "Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right." Application note 3 to § 2C1.1 provides: "Do not apply §3B1.3 * * * except where the offense level is determined under §2C1.1(c)(1), (2), or (3). In such cases, an adjustment from §3B1.3 * * * may apply."

Application note 3 is part of the commentary that explains and interprets how the guideline is to be applied and, as such, is binding on the courts. *Stinson v. United States*, 61 U.S.L.W. 4447 (1993) (commentary that interprets or explains guideline is authoritative); *see also* U.S.S.G. § 1B1.7 ("Failure to follow such commentary could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal."). Since the application note expressly prohibits the imposition of a § 3B1.3 enhancement to a sentence under § 2C1.1 unless the offense level is determined under one of the enumerated exceptions, and since Robert Giacomi's offense level was not determined under any of the exceptions, the sentencing court erred in applying the § 3B1.3 enhancement. Therefore, we must vacate the sentence and remand for resentencing.

Appendix A
Opinion of the United States Court of Appeals

We note in passing that in pronouncing Robert Giacomi's sentence orally, Judge Daly mentioned only one sentence, without differentiating between the three counts of conviction. This practice is consistent with the sentencing guidelines, which direct the court to determine an adjusted combined offense level applicable to all counts and impose one sentence as the total punishment. *See* U.S.S.G. § 3D1.1 ("Procedure for Determining Offense Level on Multiple Counts"); U.S.S.G. § 3D1.5 ("Determining the Total Punishment"); U.S.S.G. § 5G1.2 ("Sentencing on Multiple Counts of Conviction"). However, where the maximum allowable sentence on one of the component counts is less than the guideline sentence imposed, the statutory maximum is the guideline sentence for that count of conviction. U.S.S.G. § 5G1.2(b) (incorporating by reference § 5G1.1(a)). Following these directions, Judge Daly, in preparing the written judgment and commitment order for Giacomi, indicated fifty-one months, the result of his guideline calculation, as the sentence on counts one and two, and thirty-six months, the statutory maximum, for Giacomi's third count of conviction, filing a false tax return. *See* 26 U.S.C. § 7206(1). While it would have been better, given the effect of a statutory maximum on one of the counts, to refer specifically to each count at the sentencing hearing, we would not require a resentencing merely because the court failed to do so. In this case, however, since we are already remanding for resentencing because of the application of the § 3B1.3 enhancement, Judge Daly can avoid any further problems by specifying at the resentencing proceeding the specific jail term being imposed on each count.

B. Failure to Differentiate Between a Bribe and a Reward.

Appendix A
Opinion of the United States Court of Appeals

Fred Giusti argues that there is a "hole" in the sentencing guidelines because he was convicted of receiving a "reward" under 18 U.S.C. § 666(a)(1)(B), but the applicable guideline, U.S.S.G. § 2C1.1, covers only "bribes". He claims that the trial court erred by failing to determine whether he received a bribe or a reward and sentence him accordingly. In response, the government argues that Giusti's characterization of the payments to him as "rewards" is incorrect, that any corrupt payment received in violation of 18 U.S.C. § 666 is a "bribe", and that the applicable guideline for § 666 offenses was correctly determined by the district court to be § 2C1.1.

Giusti argues that he was convicted for receiving a reward for past actions, not for receiving a bribe. While 18 U.S.C. § 666 is entitled "Theft or bribery concerning programs receiving Federal funds", the statute itself criminalizes "corruptly * * * accept[ing] * * * anything of value * * * intending to be influenced or rewarded * * * in connection with any * * * transaction" of a local government official. 18 U.S.C. § 666 (a)(1)(B). The indictment and the jury charge both tracked the language of the statute, including the language "intending to be influenced or rewarded", without differentiating between being "influenced" and being "rewarded". Giusti does not dispute the validity of the indictment or of the jury charge.

For all practical purposes, the difference between influencing and rewarding official action is one of timing. To influence, the payment is made before the official action; to reward, the payment is made afterwards. The evidence at trial revealed that Giusti was a member of Waterbury's Board of Aldermen from January 1, 1986, to February 9, 1989, and that he received corrupt payments from July 5, 1988, to October 5, 1988. Since the time during which he received corrupt

payments fell within his term in office, it is not clear that he received the payments only as a reward for past actions. Indeed, on this record a factfinder could reasonably infer that the payments were bribes, or rewards, or both. Therefore, on a factual level the evidence does not compel Giusti's assertion that he was the recipient of rewards rather than bribes.

Even if the payments Giusti received were in fact rewards made for past actions rather than bribes to influence future actions, he was correctly sentenced under § 2C1.1, entitled "Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right". Giusti argues that § 2C1.1 covers only bribes, because it does not refer to rewards or gratuities and that § 2C1.2, entitled "Offering, Giving, Soliciting, or Receiving a Gratuity", should apply to him. The statutory index of the sentencing guidelines, which specifies which guideline applies to which crime, lists both § 2C1.1 and § 2C1.2 as applicable guidelines for 18 U.S.C. § 666(a)(1)(B) offenses. However, guideline § 2C1.2, which covers gratuities, does not include a corrupt purpose as an element of the offense. *See* U.S.S.G. § 2C1.2, comment. (background). Since a corrupt purpose was an essential element of Giusti's conviction under 18 U.S.C. § 666, *cf. United States v. Crozier*, 987 F.2d 893 (2d Cir. 1993) (rejecting claim that former § 666(c) was bribery-only statute; court's failure to distinguish between bribe and gratuity inconsequential since it clearly instructed jury on mens rea), sentencing pursuant to § 2C1.2 would be inappropriate, leaving § 2C1.1 as the only applicable guideline.

Section 2C1.1's failure to refer to "rewards" does not mean there is a "hole" in the guidelines. Not every criminal statute has a guideline that mirrors its language; the statutory index simply "specifies the guidelines section * * * ordinarily

applicable to the statute of conviction." U.S.S.G. App. A, intro. The first circuit recently confronted a similar issue in *United States v. Mariano*, 983 F.2d 1150, 1158-60 (1st Cir. 1993). There, the defendants claimed that they had given a gratuity, rather than a bribe, to a municipal official in violation of 18 U.S.C. § 666(a)(2), and should be sentenced under the gratuity guideline, § 2C1.2. The district court rejected their argument and sentenced them under the bribery guideline, § 2C1.1. The first circuit upheld the district court's choice of guideline, because the offenses to which the defendants pled guilty "involved corrupt intent"; therefore, "the determination that their actions were more akin to bribe-giving than to gift-giving was not clearly erroneous." *Mariano*, 983 F.2d at 1159.

Giusti argues not that he was improperly convicted under 18 U.S.C. § 666, only that he was improperly sentenced. Because the jury's verdict establishes that Giusti had a corrupt intent, his actions are more akin to bribe-receiving than to gift-receiving. As we view it, the crucial factor in this case is the corrupt purpose, not the timing of the payment. Therefore, sentencing Giusti under the bribery guideline was not clearly erroneous.

CONCLUSION

Because the district court improperly applied a two-level enhancement under § 3B1.3 to Robert Giacomi, we vacate his sentence and remand for resentencing; his conviction, however, is affirmed. The judgments against Santopietro, Pisciotti, Vitarelli, Jack Giacomi, and Giusti are affirmed.

Appendix B
Order of United States Court of Appeals
On Petition for Rehearing and Suggestion for Rehearing In Banc

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29th day of July, one thousand nine hundred and ninety-three.

FILED: July 29, 1993

Docket Nos. 92-1334 (L) and 92-1349, 1381

UNITED STATES OF AMERICA,
Appellee,

v.

JEFFREY P. SANTOPIETRO, THOMAS E. PORZIO,
Defendants,

PAUL R. VITARELLI, JOSEPH J. SANTOPIETRO, ROBERT A. GIACOMI, FRED L. GIUSTI and JACK R. GIACOMI, and PERRY A. PISCIOTTI,
Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellants Joseph Santopietro and Perry Pisciotti,

Appendix B
Order of United States Court of Appeals
On Petition for Rehearing and Suggestion for
Rehearing In Banc

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Appendix C
Constitutional and Statutory Provisions

U.S. CONST. amend. V states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. VI states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. § 371 states:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 665 states:

(a) Whoever, being an officer, director, agent, or employee of, or connected in any capacity with any agency or organization receiving financial assistance or any funds under the Comprehensive Employment and Training Act or the Job Training Partnership Act knowingly enrolls an ineligible participant, embezzles, willfully misapplies, steals, or obtains by fraud any of the moneys, funds, assets, or property which are the subject of a financial assistance agreement or contract pursuant to such Act shall be fined not more than $10,000 or imprisoned for not more than 2 years, or both; but if the amount so embezzled, misapplied, stolen, or obtained by fraud does not exceed $100, such person shall be fined not more than $1,000 or imprisoned not more than 1 year, or both.

(b) Whoever, by threat or procuring dismissal of any person from employment or of refusal to employ or refusal to renew a contract of employment in connection with a financial assistance agreement or contract under the Comprehensive Employment and Training Act or the Job Training Partnership Act induces any person to give up any money or thing of any value to any person (including such organization

or agency receiving funds) shall be fined not more than $1,000, or imprisoned not more than 1 year, or both.

(c) Whoever willfully obstructs or impedes or willfully endeavors to obstruct or impede, an investigation or inquiry under the Comprehensive Employment and Training Act or the Job Training Partnership Act, or the regulations thereunder, shall be punished by a fine of not more than $5,000, or by imprisonment for not more than 1 year, or by both such fine and imprisonment.

18 U.S.C. § 666 states:

(a) Whoever, if the circumstances described in subsection (b) of this section exists--

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof--

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that--

(i) is valued at $5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or

rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more; or

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;

shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

(c) This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

(d) As used in this section--

(1) the term "agent" means a person authorized to act on behalf of another person or a

government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative;

(2) the term "government agency" means a subdivision of the executive, legislative, judicial, or other branch of government, including a department, independent establishment, commission, administration, authority, board, and bureau, and a corporation or other legal entity established, and subject to control, by a government or governments for the execution of a governmental or intergovernmental program;

(3) the term "local" means of or pertaining to a political subdivision within a State; and

(4) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(4) the term "in any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time for both before and after the commission of the offense.

Appendix C
Constitutional and Statutory Provisions

18 U.S.C. § 872 states:

> Whoever, being an officer, or employee of the United States or any department or agency thereof, or representing himself to be or assuming to act as such, under color or pretense of office or employment commits or attempts an act of extortion, shall be fined not more than $5,000 or imprisoned not more than three years, or both; but if the amount so extorted or demanded does not exceed $100, he shall be fined not more than $500 or imprisoned not more than one year, or both.

18 U.S.C. § 1344 states:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice--
>
> (1) to defraud a financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
>
> shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1951 states:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any

article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section--

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between

> points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.
>
> (c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

18 U.S.C. § 3231 states:

> The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.
>
> Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

26 U.S.C. § 7201 states:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Appendix C
Constitutional and Statutory Provisions

28 U.S.C. § 1254 (1) states:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

U.S.S.G. § 2C1.1 states:

(a) Base Offense Level: 10

(b) Specific Offense Characteristics

(1) If the offense involved more than one bribe or extortion, increase by 2 levels.

(2) (If more than one applies, use the greater):

(A) If the value of the payment, the benefit received or to be received in return for the payment, or the loss to the government from the offense, whichever is greatest, exceeded $2,000, increase by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit).

(B) If the offense involved a payment for the purpose of influencing an elected official or any official holding a high level decision-making or sensitive position, increase by 8 levels.

Appendix C
Constitutional and Statutory Provisions

(c) Cross References

(1) If the offense was committed for the purpose of facilitating the commission of another criminal offense, apply the offense guideline applicable to a conspiracy to commit that other offense if the resulting offense level is greater than that determined above.

(2) If the offense was committed for the purpose of concealing, or obstructing justice in respect to, another criminal offense, apply §2X3.1 (Accessory After the Fact) or §2J1.2 (Obstruction of Justice), as appropriate, in respect to that other offense if the resulting offense level is greater than that determined above.

(3) If the offense involved a threat of physical injury or property destruction, apply §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) if the resulting offense level is greater than that determined above.

(d) Special Instruction for Fines - Organizations

(1) In lieu of pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use the greatest of: (A) the value of the unlawful payment; (B) the value of the benefit received or to be received in return for the

> unlawful payment; or (C) the consequential damages resulting from the unlawful payment.

U.S.S.G. § 2C1.1, Application Note 5 states:

> Where the court finds that the defendant's conduct was part of a systematic or pervasive corruption of a governmental function, process, or office that may cause loss of public confidence in government, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).

U.S.S.G. § 3C1.1 states:

> If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels.

U.S.S.G. § 3C1.1, Application Note 3(d) states:

> The following is a non-exhaustive list of examples of the types of conduct to which this enhancement applies:
>
> (d) destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding (*e.g.*, shredding a document or destroying

> ledgers upon learning that an official investigation has commenced or is about to commence), or attempting to do so; however, if such conduct occurred contemporaneously with arrest (*e.g.*, attempting to swallow or throw away a controlled substance), it shall not, standing alone, be sufficient to warrant an adjustment for obstruction unless it resulted in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender....

U.S.S.G. § 5K2.0 states:

> Under 18 U.S.C. § 3553(b) the sentencing court may impose a sentence outside the range established by the applicable guideline, if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." Circumstances that may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The controlling decision as to whether and to what extent departure is warranted can only be made by the courts. Nonetheless, this subpart seeks to aid the court by identifying some of the factors that the Commission has not been able to take into account fully in formulating the guidelines. Any case may

involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing court. Similarly, the court may depart from the guidelines, even though the reason for departure is taken into consideration in the guidelines (*e.g.*, as a specific offense characteristic or other adjustment), if the court determines that, in light of unusual circumstances, the guideline level attached to that factor is inadequate.

Where, for example, the applicable offense guideline and adjustments do take into consideration a factor listed in this subpart, departure from the applicable guideline range is warranted only if the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense. Thus, disruption of a governmental function, §5K2.7, would have to be quite serious to warrant departure from the guidelines when the applicable offense guideline is bribery or obstruction of justice. When the theft offense guideline is applicable, however, and the theft caused disruption of a governmental function, departure from the applicable guideline range more readily would be appropriate. Similarly, physical injury would not warrant departure from the guidelines when the robbery offense guideline is applicable because the robbery guideline includes a specific adjustment based on the extent of any injury. However, because the robbery guideline does not deal

with injury to more than one victim, departure would be warranted if several persons were injured.

Also, a factor may be listed as a specific offense characteristic under one guideline but not under all guidelines. Simply because it was not listed does not mean that there may not be circumstances when that factor would be relevant to sentencing. For example, the use of a weapon has been listed as a specific offense characteristic under many guidelines, but not under immigration violations. Therefore, if a weapon is a relevant factor to sentencing for an immigration violation, the court may depart for this reason.

U.S.S.G. § 5K2.7 states:

If the defendant's conduct resulted in a significant disruption of a governmental function, the court may increase the sentence above the authorized guideline range to reflect the nature and extent of the disruption and the importance of the governmental function affected. Departure from the guidelines ordinarily would not be justified when the offense of conviction is an offense such as bribery or obstruction of justice; in such cases interference with a governmental function is inherent in the offense, and unless the circumstances are unusual the guidelines will reflect the appropriate punishment for such interference.

U.S.S.G. § 6A1.3 Commentary states:

In pre-guidelines practice, factors relevant to sentencing were often determined in an informal

fashion. The informality was to some extent explained by the fact that particular offense and offender characteristics rarely had a highly specific or required sentencing consequence. This situation will no longer exist under sentencing guidelines. The court's resolution of disputed sentencing factors will usually have a measurable effect on the applicable punishment. More formality is therefore unavoidable if the sentencing process is to be accurate and fair. Although lengthy sentencing hearings should seldom be necessary, disputes about sentencing factors must be resolved with care. When a reasonable dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information. Written statements of counsel or affidavits of witnesses may be adequate under many circumstances. An evidentiary hearing may sometimes be the only reliable way to resolve disputed issues. *See United States v. Fatico*, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979). The sentencing court must determine the appropriate procedure in light of the nature of the dispute, its relevance to the sentencing determination, and applicable case law.

In determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial. 18 U.S.C. § 3661. Any information may be considered, so long as it has "sufficient indicia of reliability to support its probable accuracy." *United States v. Marshall*, 519 F.Supp. 751 (D.C. Wis. 1981), *aff'd*, 719 F.2d 887 (7th Cir. 1983); *United States v. Fatico*, 579 F.2d 707 (2d Cir. 1978).

Reliable hearsay evidence may be considered. Out-of-court declarations by an unidentified informant may be considered "where there is good cause for the nondisclosure of his identity and there is sufficient corroboration by other means." *United States v. Fatico*, 579 F.2d at 713. Unreliable allegations shall not be considered. *United States v. Weston*, 448 F.2d 626 (9th Cir. 1971).

The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case.

If sentencing factors are the subject of reasonable dispute, the court should, where appropriate, notify the parties of its tentative findings and afford an opportunity for correction of oversight or error before sentence is imposed.

SUP. CT. R. 12.2 states:

2. Parties interested jointly, severally, or otherwise in a judgment may petition separately for a writ of certiorari; or any two or more may join in a petition. A party who is not shown on the petition for a writ of certiorari to have joined therein at the time the petition is filed with the Clerk may not thereafter join in that petition. When two or more cases are sought to be reviewed on a writ of certiorari to the same court and involve identical or closely related questions, a single petition for a writ of certiorari covering all the cases will suffice. A petition for a

Appendix C
Constitutional and Statutory Provisions

writ of certiorari shall not be joined with any other pleading.

SUP. CT. R. 14.1 (f) states:

> (f) The constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case, setting them out verbatim, and giving the appropriate citation therefor. If the provisions involved are lengthy, their citation alone will suffice at this point and their pertinent text must be set forth in the appendix referred to in subparagraph .1(k) of this Rule.

Supreme Court, U.S.
FILED
DEC 27 1993
OFFICE OF THE CLERK

Nos. 93-671 and 93-681

In the Supreme Court of the United States

OCTOBER TERM, 1993

JOSEPH J. SANTOPIETRO AND PERRY A. PISCIOTTI,
PETITIONERS

v.

UNITED STATES OF AMERICA

PAUL R. VITARELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court was authorized to depart upward, pursuant to Sentencing Guidelines § 2C1.1, Application Note 5, from the Guidelines sentence for petitioners Santopietro and Pisciotti based on the fact that their offenses involved a "systematic or pervasive corruption of a governmental function, process, or office that may cause loss of public confidence in government."

2. Whether the district court correctly enhanced the sentences of petitioners Santopietro and Pisciotti for obstruction of justice pursuant to Sentencing Guidelines § 3C1.1.

3. Whether petitioner Pisciotti was denied his Sixth Amendment right to effective assistance of counsel because the attorney who represented him during the government's investigation and through the first four days of trial had a conflict of interest.

4. Whether law enforcement agents who testified at petitioners' trial improperly commented on petitioners' guilt and invaded the province of the jury.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	2
Statement	2
Argument	9
Conclusion	20

TABLE OF AUTHORITIES

Cases:

United States v. *Chavis*, 772 F.2d 100 (5th Cir. 1985) 17
United States v. *Fogg*, 652 F.2d 551 (5th Cir. 1981), cert. denied, 456 U.S. 905 (1982) 19
United States v. *Garcia*, 900 F.2d 45 (5th Cir. 1990) 10
United States v. *Griffin*, 945 F.2d 378 (11th Cir. 1991), cert. denied, 112 S. Ct. 1958 (1992) 13
United States v. *Johnson*, 319 U.S. 503 (1943) 18
United States v. *Lamere*, 980 F.2d 506 (8th Cir. 1992) 12
United States v. *Mang Sun Wong*, 884 F.2d 1537 (2d Cir. 1989), cert. denied, 493 U.S. 1082 (1990) 19
United States v. *McGill*, 952 F.2d 16 (1st Cir. 1991) 15
United States v. *Montoya*, 967 F.2d 1 (1st Cir.), cert. denied, 113 S. Ct. 507 (1992) 13
United States v. *Navejar*, 963 F.2d 732 (5th Cir. 1992) 15
United States v. *Nersesian*, 824 F.2d 1294 (2d Cir.), certs. denied, 484 U.S. 957, 958 (1987) and 484 U.S. 1061 (1988) 17
United States v. *Olano*, 113 S. Ct. 1770 (1993) 17
United States v. *Prince*, 883 F.2d 953 (11th Cir. 1989) 17

Cases—Continued: Page

United States v. *Sarault*, 975 F.2d 17 (1st Cir. 1992) 10
United States v. *Stout*, 936 F.2d 433 (9th Cir. 1991) 12
United States v. *Ushery*, 968 F.2d 575 (6th Cir.), cert. denied, 113 S. Ct. 392 (1992) 13
United States v. *Vachon*, 869 F.2d 653 (1st Cir. 1989) 17

Constitution, statutes, rules and Sentencing Guidelines:

U.S. Const. Amend. VI 14
18 U.S.C. 371 2
18 U.S.C. 665(a) 2
18 U.S.C. 666 ..... 16, 18
18 U.S.C. 666(a)(1)(B) 2
18 U.S.C. 666(a)(2) 2
18 U.S.C. 1344 2
26 U.S.C. 7201 2
26 U.S.C. 7206(1) 2
28 U.S.C. 2255 15
Fed. R. Crim. P. 52(b) 17
Sup. Ct. R. 13 2
Sentencing Guidelines:
§ 2C1.1 7
§ 2C1.1, Application Note 5 ..... 7, 9, 10, 11
§ 3C1.1 ..... 6, 11, 12, 14
§ 3C1.1, Application Note 3 11
§ 3C1.1, Application Note 3(d) 11, 12
§ 5K2.7 ..... 7, 9, 10, 11
§ 6A1.3, Commentary 13

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-671

JOSEPH J. SANTOPIETRO AND PERRY A. PISCIOTTI, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 93-681

PAUL R. VITARELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (93-671 Pet. App. 1a-10a) is reported at 996 F.2d 17.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 1993. A petition for rehearing was denied on July 29, 1993. 93-671 Pet. App. 11a-12a. The petition for a writ of certiorari in No. 93-671 was filed on October 26, 1993. The petition for a writ of certiorari in No. 93-681 was filed on October 29, 1993, and thus is out of time under this Court's Rule 13. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Connecticut, the three petitioners were convicted of conspiring to commit bribery, in violation of 18 U.S.C. 371. Petitioner Santopietro also was convicted on five counts of receiving corrupt payments, in violation of 18 U.S.C. 666(a)(1)(B); two counts of bank fraud, in violation of 18 U.S.C. 1344; six counts of embezzlement of federal grant funds, in violation of 18 U.S.C. 665(a); and two counts of tax evasion, in violation of 26 U.S.C. 7201. Petitioner Pisciotti also was convicted on three counts of giving corrupt payments, in violation of 18 U.S.C. 666(a)(2), and one count of bank fraud, in violation of 18 U.S.C. 1344. Petitioner Vitarelli also was convicted on one count of receiving corrupt payments, in violation of 18 U.S.C. 666(a)(1)(B), and one count of making a false statement on his tax return, in violation of 26 U.S.C. 7206(1). Santopietro was sentenced to 108 months' imprisonment, to be followed by three years' supervised release. Pisciotti was sentenced to 114 months' imprisonment, to be followed by three years' super-

vised release. Vitarelli was sentenced to 41 months' imprisonment, to be followed by three years' supervised release. The court of appeals affirmed. 93-671 Pet. App. 1a-10a.

1. Petitioner Santopietro became mayor of the city of Waterbury, Connecticut, in November 1985, and was twice reelected. Over the next five years, he conspired with petitioner Pisciotti (former Town Chairman and Republican State Central Committee member), petitioner Vitarelli (president of the city's Board of Aldermen), other government officials,[1] and a group of bankers and land developers to trade favorable city action on certain development projects in return for payments disguised as loans, sales of options, contract cancellations, and property leases. 93-671 Pet. App. 3a; Gov't C.A. Br. 2-19. Beginning shortly after Santopietro's 1985 election and continuing until approximately 1990, the conspirators collected at least $710,000 from the group of developers. *Id.* at 2-3. Santopietro also used federal grant funds administered by Waterbury's Department of Employment, Education and Grants Administration for personal travel and entertainment. *Id.* at 19-20.

2. FBI agent Michael Clark was one of approximately 35 witnesses who testified at petitioners' trial, which lasted more than five weeks. Clark was called to identify certain documents, to describe the details of a series of complex financial and real estate transactions using the documents, and to describe the execution of search warrants and interviews of certain witnesses.

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[1] Robert Giacomi (the Board of Aldermen's majority leader), Fred Giusti (an alderman and city employee), and Jack Giacomi (the City Negotiator beginning in 1987) were also convicted on a variety of charges including conspiracy.

On cross-examination, all three petitioners repeatedly questioned Clark about his views on the legality of the transactions he had described during his direct examination. Gov't C.A. Br. 24-29. For example, Pisciotti's counsel asked: "Now, you don't like any of these transactions. That's been your testimony, correct?" Agent Clark answered: "I feel that there's bank fraud, money laundering and corrupt payments in several of these transactions." *Id.* at 27. Santopietro and Pisciotti objected to the answer, and Santopietro moved to strike the answer. The court denied the motion, ruling that counsel had opened the door to Clark's answer; the court suggested that counsel not ask such questions. Feb. 28, 1992, Tr. 145-146. When Santopietro later asked the court to reconsider its ruling on the ground that the agent had given his opinion that crimes had been committed, the court agreed to reconsider the issue and invited suggestions for a cautionary instruction. Santopietro then in effect withdrew his motion to strike, stating that he would prefer the cautionary instruction rather than striking the testimony. *Id.* at 249-252. At the beginning of the next day of trial, the court gave the jury a cautionary instruction before Agent Clark retook the stand. Gov't C.A. Br. 31.

On redirect examination, the prosecutor asked Agent Clark to define the term "money laundering," which Clark had used during cross-examination. 93-681 Pet. 8. Santopietro objected on the ground that the definition was "something that [the court] will instruct the jury on." *Ibid.* The judge overruled the objection, and Clark described money laundering as the use of a "financial transaction" to "disguise either where the money came from or where the money ends

up." *Id.* at 9. No defendant was charged with money laundering.

The prosecutor also asked Agent Clark to define the term "corrupt payments," a term that he had used during cross-examination. There was no objection to that question. 93-671 Pet. 26; 93-681 Pet. 9. Agent Clark described "corrupt payments" as "anything of value" and stated that the term "comes from the statute which is Title 18, U.S. Code 666." 93-671 Pet. 26-27; 93-681 Pet. 9. There was no motion to strike the answer. When the prosecutor posed her next question about whether the statute distinguished between loans and gifts and other payments, defense counsel objected, and the objection was sustained. Mar. 3, 1992, Tr. 12-13.

On recross-examination of Clark, Santopietro exploited the cautionary instruction the court had given about Clark's testimony. Santopietro repeatedly emphasized through his recross-examination that it was up to the jury, not Clark, to decide whether certain crimes had been committed in this case. Mar. 3, 1992, Tr. 21-23.

IRS agent Daniel Mancinone also testified as a government witness at petitioners' trial. The government had Mancinone introduce several documents, including the tax returns of various defendants. During cross-examination, Vitarelli and two co-defendants attempted to introduce into evidence amended tax returns for the year 1988 that had been filed in 1991. Gov't C.A. Br. 35-36. The district court refused to admit the amended returns, but Vitarelli's counsel elicited from Mancinone on cross-examination, over government objection, testimony that the amended returns had been filed and that Vitarelli owed no tax as of the date of trial. *Id.* at 36. On redirect exami-

nation, the district court overruled petitioners' objection and permitted Mancinone to answer the question, "[t]o the best of your knowledge * * * is the filing of an amended tax return a defense to a charge of subscribing to a false tax return?" Mancinone answered in the negative. *Ibid.*; 93-681 Pet. 10-11.

3. At sentencing, after calculating Pisciotti's and Santopietro's base offense levels, the district court added a two-level enhancement based on its finding that the two of them had obstructed justice within the meaning of Sentencing Guidelines § 3C1.1. The court found that Santopietro had obstructed justice during the execution of a search warrant at his office in March 1991. Gov't C.A. Br. 102. When officers arrived to execute the warrant, Santopietro had co-defendant Jack Giacomi smuggle Santopietro's briefcase out of the building. The FBI learned of the action and retrieved the briefcase, which was found to contain documents incriminating Santopietro. *Id.* at 21.

The court found that Pisciotti obstructed justice by attempting to influence his sister's trial testimony. Gov't C.A. Br. 104. In support of that finding, the district court relied on hearsay testimony at the sentencing hearing from Agent Clark. Clark testified that an employee of the U.S. Attorney's office had overheard Pisciotti in the courthouse coffee shop telling his sister to testify that she did not remember or was confused in response to certain questions. June 23, 1992, Tr. 11-12. Because the employee did not wish to be publicly identified, the government gave the employee's name to the court in camera. *Id.* at 12-13. The court found corroboration for Clark's testimony in the grand jury and trial testimony of Pisciotti's sister. *Id.* at 37; Gov't C.A. Br. 105. The

court found the hearsay sufficiently reliable to support an enhancement for obstruction of justice. June 23, 1992, Tr. 37.

4. After the court applied the obstruction of justice enhancements to Santopietro and Pisciotti, it determined the adjusted offense levels and the Guidelines sentencing range. The court then departed upward from the Guidelines range for Santopietro and Pisciotti pursuant to Sentencing Guidelines § 2C1.1, Application Note 5, and Guidelines § 5K2.7. Section 2C1.1 provides the offense level for bribery offenses. Application Note 5 to Section 2C1.1 provides:

> Where the court finds that the defendant's conduct was part of a systematic or pervasive corruption of a governmental function, process, or office that may cause loss of public confidence in government, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).

The referenced Chapter Five, Part K of the Sentencing Guidelines consists of several policy statements that discuss grounds for departures from Guidelines sentences. In particular, Section 5K2.7 pertains to upward departures where government functions have been disrupted. It provides:

> If the defendant's conduct resulted in a significant disruption of a governmental function, the court may increase the sentence above the authorized guideline range to reflect the nature and extent of the disruption and the importance of the governmental function affected. Departure from the guidelines ordinarily would not be justified when the offense of conviction is an offense such as bribery or obstruction of justice; in such cases interference with a governmental function

> is inherent in the offense, and unless the circumstances are unusual the guidelines will reflect the appropriate punishment for such interference.

In regard to Santopietro, the district court concluded that his "extensive criminal conduct as found by the jury involving embezzlement, bank fraud and tax evasion in addition to bribery, resulted in * * * 'pervasive corruption of a governmental function, process and office' cited in Application Note 5." Gov't C.A. Br. 89. The court found that Santopietro "sent the message that for the right price [his] office was for sale, and it was for sale early on. All with an arrogance, at least as the evidence came forward, * * * that made a mockery of the faith that the electorate had placed in you, and placed in you more than one time." *Id.* at 95. The court also specifically found that "[t]he city's confidence in elected officials and any notion of sanctity in a vote cast, has been for all practical purposes shattered." *Ibid.*

In regard to Pisciotti, the court explained that

> [t]he conspiracy we heard about over five weeks of trial was not about a single act of indiscretion. It was about an overwhelming scheme to take advantage at every turn of the collusional [*sic*] * * * of Joseph Santopietro's and Richard Barbieri's obsessions with power in their respected areas. Even before the mayor had taken his oath of office, as I understand the facts, you and Mr. Barbieri were meeting or had a meeting to lay the ground work for the conspiracy charged in the indictment. Your role then as an elder statesman, Mr. Pisciotti, was in the final analysis a corrupting one rather than an enlightening one.

> The net affect [*sic*] of these plans was, as I have said, the very systematic and pervasive corruption of a governmental function, process or office contemplated in Application Note 5. Corruption that surely caused a los[s] of public confidence in government.

Gov't C.A. Br. 95-96.

5. The court of appeals affirmed. 93-671 Pet. App. 1a-10a. In its published opinion, the court addressed certain sentencing arguments raised by petitioners' co-defendants. The court summarily affirmed the judgments against petitioners, stating that it had "carefully considered" their "numerous issues on appeal" and "concluded that none of them has any merit." *Id.* at 5a.

ARGUMENT

1. Santopietro and Pisciotti contend (93-671 Pet. 10-16) that the district court erred when it departed upward from the Guidelines sentencing range pursuant to Sentencing Guidelines § 2C1.1, Application Note 5, and Guidelines § 5K2.7. Petitioners argue that the district court's reliance on Section 2C1.1, Application Note 5, runs afoul of Section 5K2.7. An upward departure under Section 2C1.1, Application Note 5, however, is not precluded by Section 5K2.7, and the departure in this case was not inconsistent with the policy articulated in Section 5K2.7.

Section 5K2.7 authorizes an upward departure in cases in which a governmental function is significantly disrupted. It specifies that such a departure is generally not appropriate, however, where such disruption is inherent in the offense, *i.e.*, in cases involving offenses such as bribery or obstruction of

justice. It nonetheless authorizes an upward departure even in those cases, if the court finds "unusual" circumstances. See, *e.g.*, *United States* v. *Sarault*, 975 F.2d 17, 19 (1st Cir. 1992) (departure appropriate under Section 5K2.7 even when disruption of governmental function is inherent in the offense if "disruption was so atypically great as to exceed the level of interference inherent in the offense"); *United States* v. *Garcia*, 900 F.2d 45, 49 (5th Cir. 1990) (departure appropriate under Section 5K2.7 even when disruption of government function is inherent in the offense if "unusual circumstances" exist).

Section 2C1.1, Application Note 5, authorizes an upward departure where the defendant's conduct was part of a pattern of "systematic or pervasive corruption," where it involved corruption of a governmental "function, process, or office," and where the corruption is such that it "may cause loss of public confidence in government."

Petitioners' case was one in which the evidence showed more than mere disruption of a governmental function. The corruption that was proved at trial permeated the Waterbury government, involved the Mayor's office and the Board of Aldermen, and affected numerous municipal decisions and transactions. Moreover, the district court found that this case "surely caused a los[s] of public confidence in government," Gov't C.A. Br. 96, and that "[t]he city's confidence in elected officials and any notion of sanctity in a vote cast, has been for all practical purposes shattered." *Id.* at 95. The upward departure in this unusual case was thus warranted by Section 2C1.1,

Application Note 5, and did not contravene Section 5K2.7.[2]

2. Santopietro and Pisciotti also challenge (93-671 Pet. 16-20) the district court's application of an enhancement to their offense levels under Sentencing Guidelines § 3C1.1, based on obstruction of justice.

Section 3C1.1 directs a sentencing court to increase a defendant's offense level by two levels if the defendant "willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense." Application Note 3 to Section 3C1.1 provides a non-exhaustive list of the types of conduct that fall within that Guideline: it includes "unlawfully influencing" a witness, "suborning, or attempting to suborn perjury," and "destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding." Application Note 3(d) explains that "if such conduct occurred contemporaneously with arrest (*e.g.*, attempting to swallow or throw away a controlled substance), it shall not, standing alone, be sufficient to warrant an adjustment for obstruction unless it resulted in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender."

The district court correctly applied the Section 3C1.1 enhancement to Santopietro based on Santo-

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[2] Santopietro and Pisciotti also contend (93-671 Pet. 15-16) that the district court failed to explain the extent of its departure. The extent of the upward departure, however, is amply supported by the court's discussion of the magnitude of the offense.

pietro's conduct in arranging for his briefcase to be smuggled out of his office when the FBI agents were executing a warrant to search that office in March 1991. There is no merit to Santopietro's contention (93-671 Pet. 17-19) that he falls within the exception in Application Note 3(d) for conduct that occurs contemporaneously with arrest, because, as he concedes (*id.* at 17), he was not arrested in March 1991 when he had the briefcase smuggled out. Moreover, as the Eighth Circuit recently held, the exception in Application Note 3(d) includes "only conduct admitting a spontaneous or visceral or reflexive response occurring at the point arrest becomes imminent," and not "cool and deliberate actions" by a defendant. *United States* v. *Lamere*, 980 F.2d 506, 515 n.6 (8th Cir. 1992); see also *United States* v. *Stout*, 936 F.2d 433, 435 (9th Cir. 1991) (attempting to flush counterfeit bill down toilet at police station after arrest for counterfeiting is not an "act of panic"). Santopietro's attempt to conceal the contents of his briefcase from the investigators is not the kind of spontaneous effort to destroy evidence that falls within the exception in Application Note 3(d).

The district court correctly applied the obstruction of justice enhancement to Pisciotti based on its finding that he attempted to influence his sister's testimony during a conversation he had with her in the courthouse coffee shop just prior to her testimony. Pisciotti argues (93-671 Pet. 19-20) that the district court erred because the court relied on hearsay evidence to make that finding and because the government did not disclose the identity of the hearsay declarant.

The Guidelines explicitly provide that "[r]eliable hearsay may be considered" in sentencing a defendant. Sentencing Guidelines § 6A1.3, Commentary; see *United States* v. *Ushery*, 968 F.2d 575, 583 (6th Cir.), cert. denied, 113 S. Ct. 392 (1992); *United States* v. *Montoya*, 967 F.2d 1, 2-3 (1st Cir.), cert. denied, 113 S. Ct. 507 (1992); *United States* v. *Griffin*, 945 F.2d 378, 381 (11th Cir. 1991), cert. denied, 112 S. Ct. 1958 (1992). Moreover, the Guidelines authorize nondisclosure of the identity of an informant who provided hearsay evidence if there is "good cause for the nondisclosure" and "there is sufficient corroboration by other means." Sentencing Guidelines § 6A1.3, Commentary.

The district court correctly found that the information provided by Agent Clark at Pisciotti's sentencing proceeding was reliable. There is nothing in the record to suggest that the government employee who relayed the information to Clark had any connection to the case or had any reason to fabricate the information. Pisciotti's case is not one in which the informant was wholly anonymous. The identity of the informant was disclosed to the court and significant descriptive information was disclosed to Pisciotti. Pisciotti was provided not only with facts about the informant's employment that made independent identification likely, but also with facts regarding the interaction between the informant and Pisciotti's sister indicating that the sister could identify the informant. See June 23, 1992, Tr. 12. Moreover, there was sufficient corroboration for the hearsay testimony through other means, including the trial and grand jury testimony of the sister. Accordingly, the district court did not err in finding that Pisciotti attempted

to influence his sister's testimony and in enhancing his sentence under Section 3C1.1 based on that finding.

3. Pisciotti argues (93-671 Pet. 20-25) that he was denied his Sixth Amendment right to effective assistance of counsel because the attorney who represented him during the government's investigation and the first four days of trial had a conflict of interest.

Throughout the government's investigation and the first four days of trial, Pisciotti was represented by attorney Paul Yamin. Prior to trial, Yamin had accompanied Pisciotti's sister when she appeared before the grand jury where she was asked to testify regarding one of the transactions later charged in the indictment. She read a statement to the grand jury that had been prepared by Yamin. Gov't C.A. Br. 59-61. That grand jury testimony and the relationship between Pisciotti, his sister, and Yamin were alluded to during Pisciotti's sentencing.

During argument about the obstruction of justice enhancement, the prosecutor stated that she believed Pisciotti's attempt to influence his sister's testimony actually had begun "between the time that she spoke to the agents at her home and the time when she appeared at the Grand Jury with Mr. Pisciotti's lawyer and a statement that Mr. Pisciotti's lawyer had written for her to tell her what the version of the events was." 93-671 Pet. 21. The prosecutor also stated that prior to acquiring evidence of Pisciotti's involvement, "it would not have been fair to tax Mr. Pisciotti himself with what we believed at the time of the Grand Jury was primarily the actions of his lawyer." *Id.* at 22. Pisciotti interprets that statement to mean that "at the time of trial, the government believed that Yamin had been involved in obstructing

justice with respect to the very allegations against which he was defending Pisciotti," 93-671 Pet. 22, and he asserts that Yamin was therefore laboring under a conflict of interest in representing him.

Regardless of the substance of Pisciotti's ineffective assistance claim, it is not ripe for review at this juncture. Claims of ineffective assistance of counsel ordinarily should be raised in the first instance in a motion under 28 U.S.C. 2255 rather than on direct appeal. See, *e.g.*, *United States* v. *Navejar*, 963 F.2d 732, 735 (5th Cir. 1992); *United States* v. *McGill*, 952 F.2d 16, 19 (1st Cir. 1991). Ineffective assistance of counsel claims are ordinarily ill-suited to resolution on direct appeal, because they typically require consideration of matters that are outside the direct appeal record. Pisciotti did not raise his ineffectiveness claim in the district court, and the district court thus did not have an opportunity to develop a record on the issue. Accordingly, Pisciotti's claim that his counsel was disabled by a conflict of interest is not properly presented for review at this time.

On the merits, Pisciotti's claim rests solely on the prosecutor's implication at sentencing that "at the time of the Grand Jury," the government believed that Pisciotti's attorney had been attempting to shape the testimony of Pisciotti's sister. 93-671 Pet. 22. Pisciotti did not introduce any evidence of any actual investigation of the attorney by the government or any evidence that the attorney had actually engaged in any misconduct. Nor did Pisciotti allege or establish in the district court any specific prejudice he suffered from the alleged conflict of

interest—proof that would be difficult to muster in any event, inasmuch as the attorney was dismissed after the first four days of trial.

4. Santopietro and Pisciotti contend that the court erred in permitting Agent Clark to testify in statutory language in characterizing their conduct. Specifically, they complain that the district court should not have permitted Agent Clark to testify that the term "corrupt payments" was "shorthand for anything of value" and that the term came from 18 U.S.C. 666. 93-671 Pet. 26-27. They contend that Clark thereby conveyed his conclusion that petitioners had violated 18 U.S.C. 666 and implicitly bolstered the credibility of other government witnesses. They also contend that Clark's testimony about "money laundering" and "corrupt payments" improperly bolstered the government's case. 93-671 Pet. 27-29. Vitarelli makes the related claim that the district court should have excluded opinion testimony by Agents Clark and Mancinone that invaded the province of the jury. 93-681 Pet. 22-32.

Contrary to petitioners' contention (93-671 Pet. 26), Agent Clark's testimony on redirect examination about the meaning of the term "corrupt payments" and his reference to 18 U.S.C. 666 were not objected to, nor did any defendant move to strike his testimony on that subject. Mar. 3, 1992, Tr. 12. The court sustained an objection to the next question the prosecutor posed about the specifics of Section 666, and Agent Clark did not answer it. *Ibid.* In fact, even petitioners' objection to Clark's initial use of the term "corrupt payments" during cross-examination was withdrawn in light of the district

court's cautionary instruction about Clark's testimony.[3]

Because there was no objection, the challenge to the "corrupt payments" testimony is reviewable only for plain error. See Fed. R. Crim. P. 52(b); *United States* v. *Olano*, 113 S. Ct. 1770, 1776 (1993). But the admission of that testimony does not even remotely rise to that level. First, petitioners opened the door to testimony about the legality of their conduct by repeatedly asking Agent Clark for his opinion on the legality of various transactions and his understanding of the applicable law. In fact, Agent Clark's initial use of the term "corrupt payments" was in response to questions on cross-examination. Petitioners therefore cannot complain about the government's request on redirect examination that Agent Clark define the terms he had used on cross-examination. See *United States* v. *Prince*, 883 F.2d 953, 961-962 (11th Cir. 1989); *United States* v. *Vachon*, 869 F.2d 653, 658-659 (1st Cir. 1989); *United States* v. *Nersesian*, 824 F.2d 1294, 1308-1309 (2d Cir.), certs. denied, 484 U.S. 957, 958 (1987) and 484 U.S. 1061 (1988); *United States* v. *Chavis*, 772 F.2d 100, 107 (5th Cir. 1985).[4]

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[3] Petitioner Vitarelli concedes that he is not challenging Clark's initial testimony about "corrupt payments" on cross-examination. 93-681 Pet. 7-8.

[4] Although petitioners refer to Agent Clark's testimony about the meaning of the term "money laundering," to which there was an objection, they could not have been prejudiced by that testimony, because none of them was charged with money laundering. It is also far from clear that petitioners preserved their objection to Agent Clark's definition of money laundering. Santopietro objected to that testimony only on the ground that "[t]his is something that [the court] will

In any event, Agent Clark's testimony that the term "corrupt payments" comes from 18 U.S.C. 666 did not constitute an opinion about petitioners' guilt. And the cautionary instruction that the court gave undermined any potential prejudice by instructing the jurors that "as the finders of the facts you, the jurors, will of course ultimately decide such matters." Gov't C.A. Br. 32. See *United States* v. *Johnson*, 319 U.S. 503, 519-520 (1943) (expert witness testimony about income and expenditures of defendant did not invade province of jury in light of judge's charge, which left "jury free to exercise its untrammeled judgment upon the worth and weight of testimony"). Moreover, after the instruction was given and after Clark's testimony about "corrupt payments" on redirect examination, Santopietro revisited the issue on recross-examination. He emphasized the cautionary instruction about Clark's opinion with respect to certain crimes and the fact that it was up to the jury, not the FBI, to determine whether the defendants were guilty. Mar. 3, 1992, Tr. 21-23.

There is also no merit to Vitarelli's claim that Agent Mancinone improperly invaded the jury's province by testifying that to the best of his knowledge the filing of an amended tax return is not a defense to the offense of subscribing to a false tax return. 93-681 Pet. 10. Mancinone's testimony was in direct response to Vitarelli's cross-examination, in which he elicited testimony that he and some of the other defendants had filed amended tax returns and

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instruct the jury on"; none of the defendants objected on the ground that the agent's testimony amounted to an opinion on the defendants' guilt. 93-681 Pet. 8-9.

that Vitarelli owed no tax as of the date of trial. The cross-examination incorrectly suggested that the filing of the amended returns absolved Vitarelli of any liability for filing falsified tax returns. The government was entitled to bring out testimony to rebut that inference. See *United States* v. *Mang Sun Wong*, 884 F.2d 1537, 1543-1544 (2d Cir. 1989), cert. denied, 493 U.S. 1082 (1990). In addition, the prosecutor's question was posed to the agent in terms of the agent's knowledge and did not offer the agent's testimony as an absolute statement of the law. See *United States* v. *Fogg*, 652 F.2d 551, 556-557 (5th Cir. 1981), cert. denied, 456 U.S. 905 (1982).

More significantly, Agent Mancinone's testimony was consistent with the district court's instruction to the jury that "the mere filing of an amended return will not serve as a defense to this charge [of filing a false return]." Gov't C.A. Br. 37. Vitarelli could not have been prejudiced by testimony from an IRS agent who provided the same information that the jury later learned directly from the district court.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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PETITIONERS' REPLY MEMORANDUM

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October Term, 1993

JOSEPH J. SANTOPIETRO and PERRY A. PISCIOTTI,

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-against-

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY MEMORANDUM

Petitioners Joseph J. Santopietro and Perry A. Pisciotti respectfully submit this memorandum in reply to the government's opposition brief. In this reply, we briefly address the issue of whether Pisciotti's Sixth Amendment rights were violated because his trial lawyer had a conflict of interest. The remaining issues have been fully joined.

In recasting it as an ineffective assistance claim, the government fundamentally misperceives the nature of our argument. As our petition made clear, we contend that Pisciotti's counsel was laboring under an actual conflict of interest, not merely that he was ineffective.[1] As such, automatic reversal was required under *United States v. Cancilla*, 725 F.2d 867 (2d Cir. 1984), and its progeny. This being so, we need not show any "specific prejudice" or "investigation of the attorney by the government." *See* Government's Opposition Brief at 15.

Even if ours *was* an ineffective assistance claim, the government is simply wrong when it asserts that the argument is "not ripe for review" on direct appeal. *Id.* On pain of waiver, ineffective assistance claims must be raised on direct appeal where (i) a new lawyer handles the appeal; and (ii) the

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[1] Parenthetically, however, we note that the record amply supports such an inference. *See* Petitioners' Brief on Appeal at 18-19 (describing counsel's "shockingly incompetent effort" to introduce into evidence grand jury testimony helpful to the prosecution).

claim is based exclusively on the trial record. *Douglas v. United States*, No. 93-2028, *slip op.* (2d Cir. December 22, 1993) (*citing Billy-Eko v. United States*, 1993 WL 429785 (2d Cir. October 25, 1993) (collecting cases). Both of these criteria are satisfied here.

Respectfully submitted,

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